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Beyond the Infallible Jury: A Case for Broader Appellate Review of Convictions in Canada

by

Michael Cory Plaxton

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws

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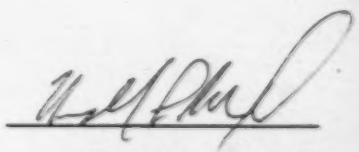

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Abstract

The Rule of Law, substantively understood, dictates that the liberal State incorporate a law of crimes complete with procedural safeguards to protects individuals from wrongful deprivations of liberty by the State. Among these safeguards is an effective mechanism of appellate review of convictions. Since the *Criminal Appeal Act 1907* was brought into force in England, Commonwealth nations have used appellate review as a means of correcting wrongful convictions. Yet Canadian appellate courts, unlike those in England and Australia, have interpreted their powers of review in an extremely narrow manner. This is particular so where the error at trial is alleged to be one of fact rather than one of law. The author argues that traditional justifications for narrow appellate review of convictions – the finality principle and the superior vantage point of the original trier of fact – are inadequate. Furthermore, other appellate review provisions in the *Criminal Code* seem plainly incompatible with s. 686(1)(a)(i), suggesting that there is no principled basis for the current standard of review on questions of fact. Finally, the author argues that there are no suitable substitutes for appellate review of convictions, to be found in Canadian criminal procedure.

Dedication

To my wife, Pamela. Our journey together is just beginning. I love you (beyond a reasonable doubt).

Acknowledgments

This paper would not have been possible without the invaluable assistance of my supervisor, F. C. (Ted) DeCoste, whose guidance in the theoretical aspects of this work was enlightening and will serve me in good stead as a student, an educator, and a lawyer. I would also like to thank the other members of the examining committee, James C. Robb, Bruce P. Elman, and Dr. Sanjeev S. Anand, for their helpful comments and suggestions. Finally, I thank Marvin R. Bloos, Appellate Counsel, *Beresh DePoe Cunningham*, for inspiring me to adopt this topic of research in the first place. Many of the ideas contained herein first saw the light of day in Marvin's office; I can only hope that the pages that follow do justice to their complexity and importance.

Table of Contents

PREFACE 1

CHAPTER I – THE LIBERAL PHILOSOPHY OF CRIMINAL LAW

INTRODUCTION 6

LIBERALISM AS THE PRIORITY OF THE RIGHT OVER THE GOOD 7

LIBERTY 12

THE RULE OF LAW 14

THE FORMALIST VIEW 14
THE SUBSTANTIVE CONCEPTION 16
THE INSTITUTIONAL REQUIREMENTS OF THE RULE OF LAW 19
Criminal Law and the Harm Principle 20
The Integrity of Law 24
No Ex Post Facto Laws 26
Generality of Laws 28
Due Process, Stare Decisis, and the Punishment Constraint 28
Beyond Due Process: Appellate Review and the Prerogative of Mercy 31
Division of Powers 32

THE JUSTIFICATION OF PUNISHMENT 34

CONCLUSION 35

CHAPTER II - APPELLATE REVIEW IN CONTEXT

INTRODUCTION 37

II.1 APPELLATE REVIEW OF CONVICTIONS IN ENGLAND 37

THE CRIMINAL APPEAL ACT OF 1907 37
JUDICIAL TREATMENT OF THE CRIMINAL APPEAL ACT 1907 40
THE CRIMINAL APPEAL ACT 1968 41
THE MISCARRIAGES OF JUSTICE REPORT 43
THE ROYAL COMMISSION ON CRIMINAL JUSTICE REPORT 44
THE CRIMINAL APPEAL ACT 1995 49
JUDICIAL TREATMENT OF THE AMENDED SECTION 2(1) 50

II. 2 APPELLATE REVIEW OF CONVICTIONS IN AUSTRALIA 55

JUDICIAL INTERPRETATION OF APPELLATE JURISDICTION TO OVERTURN CONVICTIONS 55
CHAMBERLAIN AND ANOTHER V. THE QUEEN (NO. 2) ("THE DINGO CASE") 60

II.3 APPELLATE REVIEW OF CONVICTIONS IN CANADA 63

THE CRIMINAL CODE 1892 - PRESENT 63
JUDICIAL INTERPRETATION OF THE SCOPE OF APPELLATE POWER 1923 - 1973 64

R. v. Corbett 65
What is the Test Laid Down by the Majority? *65*
"It is Not the Function of the Court to Substitute Itself for the Jury..." *67*
Yebes v. The Queen 69
After Yebes 71
Rejecting Yebes? 72

CHAPTER III – JUSTIFYING NARROW APPELLATE REVIEW OF QUESTIONS OF FACT

INTRODUCTION 74

III.1 THE FINALITY PRINCIPLE AND APPELLATE REVIEW 74

Respect for the Legal Community 76
The Administration of Justice as Socially Responsive 77
The Administration of Justice as Democratic 78
The Credibility of Trial Judges 78
Must the Finality Principle Entail Wide Appellate Deference on Questions of Fact? 79
Upon Whom Lies the Persuasive Burden? A Brief Note on Method 80
The Principle that Only the Guilty Should be Convicted 81
An Administrative Nightmare? 85

III.2 SHOULD DEMEANOUR BE A BAR TO APPELLATE REVIEW? 86

Are Trial Findings of Demeanour Trustworthy? 88
Re-Thinking the Trial Judge's Duty to Give Reasons 93
Should Trial Proceedings be Recorded? 96

III.3 DO APPELLATE COURTS HAVE ANY PARTICULAR EXPERTISE TO INTERFERE WITH TRIAL FACT-FINDINGS? 97

CHAPTER IV – MAKING APPELLATE REVIEW IN CANADA HOLISTICALLY COHERENT

INTRODUCTION 102

IV.1 COMPARING SECTION 686(1)(A)(I) WITH SECTION 686(1)(B)(III) 102

Section 686(1)(b)(iii) ("No Substantial Wrong or Miscarriage of Justice") 102
What is the Test? *104*
Section 686(1)(b)(iii) Should Involve a Narrower Standard of Review Than Section 686(1)(a)(i) *106*
Section 686(1)(b)(iii) Case Law: Cartwright J.'s Interpretation Wins *108*
When Will an Appellate Court Dispute the Findings of the Original Trier of Fact? *112*
Is Spence J.'s Test Re-Emerging? *115*

IV.2 SECTION 686(4) (APPEALS FROM ACQUITTAL)... 117

CHAPTER V – ALTERNATIVES TO APPELLATE REVIEW

INTRODUCTION: IS NARROW APPELLATE REVIEW OFFSET BY OTHER MEANS OF RECTIFYING OR PREVENTING MISCARRIAGES OF JUSTICE? 120

The Preliminary Inquiry and Directed Verdicts 120
Section 690 123

The Prerogative of Mercy *123*
The Doctrine of Legitimate Expectation *125*
What Legitimate Expectations Have Been Created as Concerns Section 690? *127*
SECTION 686(1)(A)(III) 130

POSTSCRIPT **133**

NOTES **138**

Preface

On 19 December 1997, the Ontario Court of Appeal released its decision in the case of *R.* v. *Paul Kenneth Bernardo*.[1] The Court held that Mr. Bernardo, convicted of having kidnapped, confined, sexually assaulted, tortured and murdered two young women, was entitled to funded counsel, under s. 684(1) of the *Criminal Code*, so that he could appeal his conviction. Mr. Justice Doherty, writing for the Court, stated:

> Appellate review as provided for by Part XXI of the *Criminal Code* is not an indulgence to be doled out to those who are somehow seen as deserving of the opportunity to challenge their conviction. The salutary purposes underlying broad appellate review on appeals from convictions are engaged and must be served no matter how heinous the crime or despicable the accused. Detached and reflective appellate-review of the trial process is perhaps the most important in notorious, emotion-charged cases involving the least deserving accused. It is in those cases that the public eye is most closely focused on the process and the mettle of the criminal justice system undergoes its severest test. By giving the most repugnant appellant full recourse to meaningful appellate review, and by subjecting the apparently most deserving convictions to careful appellate scrutiny the integrity of the process is maintained and a commitment to the unbending application of the Rule of Law is affirmed.[2]

On 18 November 1999, Madam Justice Abella of the Ontario Court of Appeal unsealed the documents relating to Mr. Bernardo's appeal. He argues that numerous errors of law occurred at trial, that, in effect, he received no fair trial and ought not to be convicted on the basis of findings "tainted" by legal error. He does not suggest that he is, in any sense, innocent of the crimes for which he was convicted. He does not claim that a jury, properly instructed, was not entitled to convict him of the crimes of which he is accused.[3]

On 21 May 1999, Gordon Folland appeared before Mr. Justice Stayshyn of the Ontario Superior Court. This was not their first meeting. On 16 March 1995, it was Mr. Justice Stayshyn who presided over the jury that convicted Mr. Folland of sexual assault. On 1 May 1995, Stayshyn J. sentenced him to five years' imprisonment. The primary

evidence against Mr. Folland was the identification evidence of the complainant. Though she could not see her assailant at the time of the assault, the complainant claimed that he was a balding man. Of the two suspects, Mr. Folland was balding and the other was not. Two and one half years into serving his sentence, Mr. Folland brought forward an appeal on the basis of fresh evidence that demonstrated that he could not have been the person who sexually assaulted the complainant.[4] Stayshyn J. apologized while Mr. Folland wept in relief.[5]

Had Mr. Folland attempted to appeal his conviction, without fresh evidence, he would have found himself in difficult straits. There were no errors in law. The evidence of the complainant, if believed by the jury, was certainly a sufficient basis – in theory at least – for the jury to convict. On what ground could he appeal? To the Court, he could say only that he did not commit the offence with which he was charged, and should not be punished.

It is not suggested that Mr. Bernardo is less worthy of a fair trial than is Mr. Folland.[6] Quite the contrary, this inquiry takes the position that both deserve something *more* than a fair trial. This work is about the obligations of the criminal justice system to make provisions *beyond* a fair trial, namely, the extent of its duty to ensure that innocent parties are not convicted *despite* their having received a fair trial. More particularly, it is the burden of this paper to demonstrate that the appellate power to review the reasonableness of convictions, under s. 686(1)(a)(i) of the *Criminal Code*, has been interpreted in an unjustifiably narrow and oppressive manner. Chapter I will examine the theoretical foundations of the criminal law, its purposes and assumptions regarding the relationship between the State and the individual. It will be posited that the Rule of Law,

being the minimum institutional requirement of the liberal State, requires certain procedural safeguards for persons accused of criminal offences. For the purposes of this paper, the most significant of these safeguards is appellate review of convictions. It will be proposed that, by failing to incorporate a broader standard of appellate review of convictions, Canada has failed to meet its minimum obligations as a Rule of Law State.

Chapter II will examine the legislative and judicial history of appellate review of convictions in England and Australia, as well as Canada. Rather than begin with Canada, and compare the jurisdictions from that starting point, Chapter II will begin with the English history of appellate review of convictions, and end with the Canadian jurisprudence. The reason for this is simple: the development of Canada's law of appellate review of convictions – particularly its legislative development – is inseparable from the English experience because Canada has borrowed much of its statutory language from English legislation. Australia, which also bases its legislative provisions, concerning appellate review of convictions, upon English statutes, is included as a demonstration of an alternative course that may have been adopted by Canadian appellate courts, as to their power to review convictions.

Chapter III will explore a number of possible justifications for the narrow standard of appellate review under s. 686(1)(a)(i) of the *Criminal Code*. First, it will question whether the finality principle can override the principle that only the innocent should be convicted, such that a narrow standard of appellate review of fact-findings in criminal cases is justified. Second, it will examine whether credibility findings based on demeanour are, or should be, accorded such weight in the determination of a verdict, that appellate courts should be barred from conducting a broad review of the reasonableness

of convictions in the absence of the recording of specific demeanour findings. Finally, Chapter III will criticize the argument that appellate courts lack any particular expertise that would entitle one to presume that they are better equipped to draw inferences from the record, than was the original trier of fact.

Chapter IV will compare s. 686(1)(a)(i) to the judicial treatment of ss. 686(1)(b)(iii) and 686(4), respectively, to determine whether the applicable standards, in each, are consistent with one another. The purpose of this Chapter is to show that there has been, in Canada, no coherent, principled approach to the defining of appellate powers to review convictions.

Chapter V will explore the potential of using the preliminary hearing, and/or s. 690, as means of providing *alternative* safeguards against miscarriages of justice in Canada. It will be suggested that the preliminary hearing has been interpreted in such a way that it cannot adequately prevent miscarriages of justice, in such a manner as could broader appellate powers of conviction review. Moreover, although there exists a prerogative of mercy, under s. 690, whereby convictions may be reviewed, the procedure under that provision allows for review only in the rarest of cases. Thus, neither can adequately function as substitutes for broader powers of appellate review. Chapter V will conclude by looking as the possibility of using s. 686(1)(a)(iii) as a means of exercising wider-scale appellate review of convictions.

The Postscript will reflect upon the recent Supreme Court decision in *R.* v. *Brooks*,[7] in which the Court split on the issue of whether jailhouse informant testimony requires a special instruction to the jury regarding its reliability. It will be argued that,

depending upon the interpretation one accrues to that decision, Canada may finally be moving towards a view of certain evidence as inherently unreliable. This, in turn, would encourage wider appellate review of trial fact-findings.

Chapter I –
The Liberal Philosophy of Criminal Law

Introduction

The purpose of this chapter is to provide the theoretical infrastructure in which the general argument is to be situated. It will be argued, in this order, that:

- liberalism is a political morality that seeks to prevent the State from determining citizens' rights based upon difference;
- the role of the State is to protect the negative liberty, as opposed to the positive liberty, of citizens;
- the minimum institutional requirement of the liberal State is the Rule of Law, understood substantively rather than formally;
- the minimum institutional requirement of a substantive conception of the Rule of Law, is a law of crimes complete with procedural safeguards of the accused;
- these procedural safeguards arise from the principle that it is better that ten guilty persons go free than one innocent person be punished; and
- this principle entails meaningful appellate review of convictions.

Various other institutional requirements of the Rule of Law will also be explored, in order to demonstrate the ideal against which the Canadian criminal justice system must be measured.

It must be stated, at the outset, that this chapter will not attempt explicitly to ground the liberal value of respect for universal equality of persons, in some posited metaphysical state of affairs. Nor will this chapter offer a rebuttal to those communitarian critics of liberalism who would deny the metaphysical claims upon which this value, and this paper, implicitly rest.[8] Rather, for the purposes of this paper, such conceptions of the self and personhood, as are necessary to sustain the arguments brought herein, will be assumed.

Liberalism as the Priority of the Right Over the Good

Liberalism, as a political morality, is an answer to difference,[9] that is, to the question, which concerns all politics, about what role, if any, should be accorded the fact of difference in the determination of the rights of citizens as against one another and against the State. Liberalism must, therefore, also address the proper scope of State power and the extent to which that power ought to be constrained. It is possible to observe how these matters inter-relate by hypothesizing a State that fixes the rights of citizens with reference to their differences. If it is legitimate to weigh the rights of citizens with reference to difference – that is, with reference to the possession, or not, of some characteristic - then the State is entitled to mediate between competing claims simply by deciding which characteristics best facilitate the continued exercise of power by those presently possessed of political authority. There is nothing to suggest that one set of characteristics is *a priori* "better" than another. In consequence, without some sort of over-arching "natural law" that certain characteristics are inherently superior to others, the question of *which* characteristics are to receive State approval is largely a question to be resolved by the State itself. The State would then be entitled to consider, in the

mediation of competing claims, which groups, defined by given criteria, have more "clout" than others, and formulate policies that favour the more influential group. Those who are not privileged members could not expect protection of their interests, irrespective of the fact that such protection may be just in a given set of circumstances. Thus, the role of difference is intimately related to both the scope of legitimate political authority, and the State's concern with justice. Reliance upon difference empowers the State to mediate the interests of citizens in a highly discretionary, unprincipled fashion that, in turn, may lead to disregard for just outcomes in favour of self-interested ones.

Liberalism represents the view that difference is *irrelevant* to the determination of rights, that *all* individuals are equal, and that political power takes a subordinate role to – indeed, exists solely to promote – justice. Any other use of power is *illegitimate*. Liberalism, then, is a political morality devoted to the constraining of State power, where the exercise of that power would have unjust results. The subversive nature of liberalism is not coincidental to its egalitarian view;[10] rather, it is subversive *because* it requires the State to deal with all individuals equally, irrespective of whatever characteristics they may or may not share, and notwithstanding any political or communal gain that may be reaped by favouring some individuals over others. When mediating competing claims and interests, the State can have regard only to the just result, as opposed to the most politically expedient or socially useful result. As enunciated by Rawls and Sandel respectively, considerations of justice, on the liberal view, "trump" other considerations:

> Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss

> of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.[11]
>
> [J]ustice is primary in that the demands of justice outweigh other moral and political interests, however pressing these others might be. On this view, justice is not merely one value among others, to be weighed and considered as the occasion arises, but the highest of all social values, the one that must be met before others can make their claims. If the happiness of the world could be advanced by unjust means alone, not happiness but justice would properly prevail. And when justice issues in certain individual rights, even the general welfare cannot override them.[12]

This priority of the right over the good carries with it certain implications. As Gray notes:

> Common to all variants of the liberal tradition is a definite conception, distinctly modern in character, of man and society. What are the several elements of this conception? It is *individualist*, in that it asserts the moral primacy of the person against the claims of any social collectivity: *egalitarian*, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of difference in moral worth among human beings; *universalist*, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and *meliorist* in its affirmation of corrigibility and improvability of all social institutions and political arrangements. [original emphasis][13]

Gray's "anatomy" of liberalism bears some explanation. First, inasmuch as the just result, in a given case, is not necessarily that which is favoured by the majority of citizens, it follows that liberalism is radically individualist. Individuals do not derive their political or moral worth from the fact of their being a part of the community and their rights are therefore not dependent upon the extant values of the community or the community's opinion regarding any individual's moral worth. In the adjudication and determination of rights, the individual is treated as a sovereign entity, whose interests compete, with those of the community, on an even "playing field." The individualistic character of liberal political morality underscores its subversive nature: the State *qua* community is deemed to be a non-essential component of the person, a disposable aspect of personal existence that could, in theory at least, be shed as one could shed a suit.

Second, as briefly noted above, liberalism is egalitarian. In the liberal State, all individuals are deemed morally equal, that is, unified in their status as persons despite any differences between them.[14] It follows that all individuals are deserving of equal consideration and equal care and respect.[15] As moral equals, they are each entitled to their own respective conceptions of the good and, without more, none of these conceptions can be considered *prima facie* more or less valid than any other.[16] No person is considered more "fit" to decide what is the law or to whom the law applies, merely because of difference; nor can any person be said to be "above the law" by virtue of difference. The law must be founded upon the consent of the community at large; it must emerge as the product of competing conceptions of the good freely expressed by the membership. No single body or class of individuals controls the law in a liberal State such that it properly has the power to affix sanctions to certain types of activity without regard to the views and beliefs of those individuals who lack the power to impose their will upon the lives of communal members. Where the actions reflective of an individual's conception of the good conflict with the well-being *qua* interests of another individual, the conflict is *not* to be resolved with reference to the superiority or inferiority of either subject's views or interests. Rather, the conflict is resolved with reference to the equality of the two citizens, the just result being that which takes into account the interests of *both* parties, to the greatest extent reconcilable with the interests of each other and with everyone else.[17] As a political morality devoted to the equality of persons, liberalism is concerned with constraining the coercive power of both the State, as against its citizens, and private citizens, as against one another; that is, with preventing the

interests of some being weighed more heavily than the interests of others in the affairs basic to human association.

Third, liberalism holds that moral worthiness is not a contingent characteristic among human beings, that is, that one's entitlement to equal treatment does not depend upon one's membership in some particular demographic category. It is universalist in this sense. It is therefore not open to the liberal State to enact a policy with disproportionately adverse effects upon certain individuals, on the grounds that these individuals are not members of a given group and, so, do not "count" in the weighing of interests. Everyone's interests deserve equal consideration.

Finally, liberalism is a meliorist philosophy, one that presumes that the State ought to, and therefore *can*, act in the best interests of its citizens rather than its own self-interest. Liberal theory operates under the assumption that all forms of government are not equal, that some are morally superior to others, and that it is possible to improve the institutional structure of government such that it is a morally superior government. Thus, it denies the nihilist and postmodern claims that all exercises of power are morally equivalent, as a zero sum, because equally determined by historical or social forces beyond the control of *anybody*. Exercises of power that treat all individuals equally are morally better than those that deny the personhood of certain individuals, or that fail to treat all persons as equals. Liberal political morality insists that, if it is possible to ensure a minimum level of equality among all individuals, then it is the responsibility of the liberal State to erect that institutional infrastructure. As it will become clear later in this chapter, the minimum institutional requirement of the liberal State, insofar as it ensures the treatment of citizens as equals, is the Rule of Law.

Liberty

It has already been noted that egalitarianism carries with it an equal *prima facie* respect for all individuals' conceptions of the good. What should be the nature of this respect, however? Is the liberal State required, to some extent, to assist individuals in the realization of their respective conceptions of the good, or need it only do nothing to hinder such realization? The issue, here, concerns what type of liberty is commensurate with equal treatment: positive or negative. Liberalism advances the view that individuals in political community are entitled to no more than negative liberty, the ability to act (within the limits expounded by the harm principle, to be explained later) without interference on the part of the State or others. Positive liberty would require the State to provide persons with the power to act; as Gray comments, such a result would be "inimical to the liberal ideal of equal freedom because power cannot by its nature be distributed equally."[18]

The conclusion, that equal treatment requires only non-interference with conceptions of the good, becomes problematic, however, when one considers what it means for the State to "interfere." Individuals may be constrained in their ability to realize their distinct conceptions of the good, not by any entity outside themselves but, on the contrary, by features internal to them. A person may be afflicted with "weakness of will, irrational fantasies or inhibitions or uncriticized socialization to conventional norms."[19] If it is the State's responsibility to ensure that all persons' respective conceptions of the good are accorded equal *prima facie* respect, then one might suppose that it is the State's duty to enforce an individual's conception of the good even against himself. This would work highly illiberal results, though, for the State would then be

charged with the responsibility and power to determine which characteristics of the individual contributed to his irrationality or weakness of will. The State would be invited to treat certain classes of people, depending on their respective cultural, social or educational backgrounds, or political or religious ideologies and/or affiliations, differently from the way in which it treats everybody else. The price, of a broadly defined "right" to non-interference by the State, is the very equal treatment of citizens, and constraint upon State power, that gave rise to the duty of non-interference in the first place. Moreover, by "looking behind" the state of mind of the individual, one undercuts liberalism's commitment to individualism; if one claims that one's freedom is constrained by one's own unwillingness to carry out certain actions, then one effectively "splits" the individual's personality into two competing sub-personalities, each vying for control of the whole. This has one of two results: either (a) one denies that there is a coherent individual, whose equality is of concern to the State; or (b) one re-defines the individual in such a way that the individual becomes not one but several "sub-individuals" whose respective interests always clash. If the latter, then the State could always justify any exercise of power directed against the person, because it could claim that certain community interests were at stake; the State could appeal to that aspect of the self that honoured societal conventions and traditions, and thereby say that the individual's interests were only those of the wider community. In either case, then, there is no sovereign entity to compete with community interests. It follows that the liberty interests protected by the State do not include the positive power to act; nor do they include liberty from constraints imposed by oneself. The State is empowered to defend the citizen only from encroachments of liberty by the State or by other individuals.

The Rule of Law

Thus far, this chapter has been concerned only with the aims and presuppositions of liberalism. Another concern is how liberalism meets these goals, that is, how a liberal State must be institutionally structured. It is submitted that the minimum institutional requirement of the liberal State is the Rule of Law, insofar as it sets conditions and practical limits upon the power of the State to interfere in the lives of its citizens. Inasmuch as the Rule of Law prevents the State and its agents from imposing the State's will upon individuals, without first conforming to legal dictates, it prevents the State from exercising its power upon select persons solely on the basis of caprice and difference. If the Rule of Law does not exist in a given State, either in principle or application, then the State in question – however benevolent its rulers - cannot satisfy the demands of liberalism, because there is nothing to prevent State actors from making decisions that target certain groups or individuals. Before identifying the indicia of the Rule of Law, however, it is first necessary to specify the meaning of the term that will guide the discussion that follows.

The Formalist View

There are two dominant conceptions of the Rule of Law: rule by rules, and rule by rights. According to both, the Rule of Law is an institutional practice whose purpose is the constraint of power. However, the conceptions differ profoundly as regards the requirements of such constraint. According to the formalist conception,[20] the Rule of Law requires only that citizens be informed as to the demands of the law. Dworkin explains the formalist conception in the following terms:

> There are, in fact, two very different conceptions of the rule of law, each of which has its partisans. The first I shall call the "rule-book" conception. It insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all. The government as well as ordinary citizens must play by these public rules until they are changes, in accordance with further rules about how they are to be changed, which are also set out in the rule book. The rule-book conception is, in one sense, very narrow, because it does not stipulate anything about the content of the rules that may be put in the rule book. It insists only that whatever rules are put in the rule book must be followed until changed.[21]

The sole consideration, in the formalist view of the Rule of Law, is that "the law must be capable of guiding the behaviour of its subjects."[22] Rawls describes the requirements of this conception of the Rule of Law:[23]

> This precept demands that laws be known and expressly promulgated, that their meaning be clearly defined, that statutes be general both in statement and intent and not be used as a way of harming particular individuals whom may be expressly named (bills of attainder), that at least the more severe offenses be strictly construed, and that penal laws should not be retroactive to the disadvantage of those to whom they apply. These requirements are implicit in the notion of regulating behaviour by public rules.[24]

While citizens must be accorded an opportunity to avoid criminal sanctions solely on the basis of their own choices and actions, as opposed to maintaining their liberty solely at the pleasure of the State, so viewed, the Rule of Law has nothing to say as regards the content of those laws which the citizen is bound to honour. There are no fundamental "rules" governing what kind of laws may or may not be drafted by the State. Thus, on the formalist view, there is no reason why the Rule of Law could not be compatible with various illiberal States that respect neither the equality of individuals nor their interests in political liberty and personal freedom.[25] This paper disputes the formalist view that the Rule of Law has no philosophical content, that it has no opinion as to the merit of a given law.[26] Quite the contrary, the Rule of Law does not emerge as a legal good – or, for that matter, as anything at all - in the absence of a liberal framework; this will be fleshed out

in greater detail in the critique of Raz's formalist conception of the Rule of Law which follows.

The Substantive Conception

The substantive conception emerges out of a recognition that the institutional aspects of the Rule of Law, as enunciated above by Rawls, together embody a distinctly liberal prioritization of the right over the good, in the sense that the Rule of Law reflects a desire to treat everyone as equal individual contributors to, and subjects before, the law. This being the case, the substantive conception (called, by Dworkin, the "rights" conception) claims that the Rule of Law contains the basis for criticizing not only the formal attributes of legal systems, but also the content of the laws contained in those legal systems. Dworkin describes the substantive conception:

> I shall call the second conception of the rule of law the "rights" conception. It is in several ways more ambitious than the rule-book [formalist] conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights can be enforced in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of the rule of law by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.[27]

On this view, the Rule of Law is inseparable from the liberal State, and one cannot conceive of an illiberal State that nonetheless satisfies the basic conditions of the Rule of Law. Thus, it becomes unnecessary to argue, as two separate matters, that the liberal State requires some recognition of equality rights, in its legislation and institutions, *and* that it requires the Rule of Law as well. In Dworkin's conception of the Rule of Law, the two components of the liberal State are inexorably bound together, and some legislative

provision for equality rights is a requirement of the Rule of Law. Inasmuch as the hallmark of the liberal State is its concern for the equality of citizens, it follows that the Rule of Law cannot be divorced from liberal political morality. T. R. S. Allan has thus asserted:

> At the core of the liberal ideal of a government of laws, and not of men, is the conviction that the state's interference with the liberty or property of individuals must be regulated by general laws, whose purposes are directed to some aspect of the common good and are not designed specifically to affect the circumstances of particular, identifiable persons. In so far as individuals are subject to coercion by the state, or deprived of benefits which other citizens enjoy at the state's expense, the particular legal orders or official decisions concerned must be justified by reference to publicly-avowed objectives which can be defended (and criticised) as serving (or failing to serve) the common good. *Equality and generality are accordingly served by the demands of rationality implicit in a proper understanding of the rule of law. The rule of law insists that all forms of discrimination between persons, at the hands of government, must be justified on grounds rationally related to a conception of the public good which is itself open to debate and scrutiny: the ruler's whim or governmental self-interest are excluded in principle.*[28]

The Rule of Law, by its very nature, serves the ends of equality and generality through its respect for the equality of all citizens. In order to persuade one of this view, however, it is necessary to address Raz's defence of the formalist conception of the Rule of Law, it being the most forceful statement of that view. Its frailty is best revealed through an examination of the implications of a certain critical admission of his, namely, that the Rule of Law facilitates the dignity and autonomy of persons.[29]

Raz describes the manner in which the Rule of Law contributes to the autonomy and dignity of individuals in the following fashion:

> We value the ability to choose styles and forms of life, to fix long-term goals and effectively direct one's life towards them. One's ability to do so depends on the existence of stable, secure frameworks for one's life and actions. The law can help to secure such fixed points of reference in two ways: (1) by stabilising social relationships which but for the law may disintegrate or develop in erratic and unpredictable ways; (2) by a policy of self-restraint designed to make the law itself a stable and safe basis for individual planning. This last aspect is the concern of the rule of law.[30]

Raz, then, acknowledges that the Rule of Law carries with it certain benefits to the individual. These are dismissed, however, as collateral. This dismissal is question-begging, though: if the Rule of Law is, as Raz claims, a legal virtue,[31] then in what *sense* is it a virtue? It is a virtue, he claims, merely in the sense that it allows the law to advance the goals that the law – *whatever it is* – was intended to advance, insofar as it allows people an opportunity to know what is the law and therefore accords to them an opportunity to obey it.[32]

In making this argument, though, Raz hangs too much on the questionable assertion that an authoritarian regime, acting reasonably and in its own self-interest, *could only* decide to adopt the Rule of Law. This argument is so far from demonstrated - indeed, it is counter-intuitive - as to lack all persuasive force. Surely no one would dispute that an authoritarian regime could simply decide to rule on an *ad hoc* basis, such that it could enforce its will without granting its subjects access to legal "loopholes." It would seem, in fact, that such a course of action would be eminently *reasonable* for those illiberal States interested only in asserting authority. The only reason, it would seem, that a State would give its citizens prior notice of the law, is for the "collateral" reasons enunciated by Raz: that the autonomy and dignity of individuals is best served by such prior notice. Since, in an authoritarian regime, those in power have no need of institutional Rule of Law protections, the individuals whose autonomy and dignity are protected must be those who have *no* power. The Rule of Law can only signify the State's concern for the powerless. This suggests that the Rule of Law is intimately concerned with the equality of citizens, such that it reveals itself to be a wholly liberal invention.[33]

Finally, let it be said that the problem, which Raz seeks to address with his formalist conception of the Rule of Law, does not strike one as such a burdensome one. His concern, it seems, is to carve out a niche for the Rule of Law that is sufficiently removed from certain political moralities, that it is not absorbed into the larger political philosophical debate. Whatever else we disagree about, Raz says, at least we can all agree that the Rule of Law is a good thing. One may retort: if the Rule of Law is only the thin model that Raz proposes, then *so what* if we all agree? A Rule of Law that is so indiscriminate in its political affiliations cannot be worth the sacrifices Raz makes. It is, after all, not obvious that Raz's authoritarian Rule of Law State, which enacts laws with disproportionate impact on its citizens and counsels intolerance among its citizenry, is anything resembling the kind of State in which anyone would want to live. Given that it seems highly unlikely that anything but a liberal State would worry about the Rule of Law anyway, and given that Raz's thin model has the effect only of providing an equally thin justification of authoritarian systems of law with nothing else going for them, whom is Raz addressing? At bottom, what is the point of the formalist project? If the substantive model hangs too much on the Rule of Law, it is at least clear that this model has some discernible, comprehensible goal that it seeks to further.

The Institutional Requirements of the Rule of Law

This section will explore the various institutional components of the substantive conception of the Rule of Law. It will be argued that the Rule of Law demands a law of crimes both be drafted in accordance with the harm principle, and otherwise satisfy a number of institutional requirements associated with the Rule of Law. These latter requirements are:

- integrity within the law;
- no *ex post facto* laws;
- generality of laws;
- due process, *stare decisis*, and the "punishment constraint;"
- a process of appellate review and/or a prerogative of mercy; and
- separation of powers among the legislative, executive and judicial branches.

Though many of the above features are also pertinent in the private law context, it is their significance in the public law that attracts the attention of this section.

Criminal Law and the Harm Principle

Although all areas of law – particularly tort and contract law – purport to manage the relationships and interaction of private citizens, the existence of a law of crimes is especially crucial to liberal theory and the Rule of Law. The State is charged with the responsibility of ensuring that the rights of individuals are determined not by raw power, but by justice. It can be of no significance to the interests of justice, which group in a given community possesses greater force of numbers, or military and/or technological strength. Yet, barring State intervention, such factors could be engaged as means to settle, through force or violence, disputes among individuals and groups. Demographic groups possessed of fewer members would, then, be permitted to pursue their respective conceptions of the good only at the pleasure of others; there could be no equal citizenship. Furthermore, such "mob rule" could be used, by the State, to perpetuate a

power imbalance that favours the governing body; the State would be able to accomplish by omission what, as established above, it could not legitimately accomplish by direct action. It therefore follows that a State committed to the priority of the right over the good – a State committed to equality - must impose some law of crimes upon the citizenry as a whole.

It must be re-asserted, however, that one does not deny another's equal participation simply by expressing the view that the other is in some way inferior, or that his conception of the good is in some way inferior. Recall that the liberty interests that are to be protected are *negative* liberty interests. While the State is required to protect the *political* equality of citizens, it is not required – indeed, it is not *entitled* – to ensure that everyone *feels* equal. Others' sense of offense, inferiority, or lack of belonging to the community at large, are of no concern to the State, *at least* so far as the exercise of its criminal law-making power is concerned.[34] Were this otherwise, the State would be empowered to interfere in the lives of citizens solely on the basis that their actions were contributing to an environment in which certain others lacked sufficient emotional or psychological support to pursue their own conceptions of the good. The State would be empowered to interfere in the lives of those citizens whose conceptions of the good were deemed less worthy than those of others. Difference would, in consequence, play a role in the determination of rights.[35]

The law of crimes, then, treads a precarious tightrope: the State must interfere in the lives of its citizens without exceeding its proper authority. The harm principle keeps that tightrope taut. The harm principle, broadly, forbids the State from criminalizing *any*

form of conduct, that does not interfere in the interests of *identifiable* others. Mill defines the harm principle as follows:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That *the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.* He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. *To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right absolute. Over himself, over his own body and mind, the individual is sovereign.*[36]

Under the Millian view, then, the State's criminal law-making powers are co-extensive with the extent to which citizens may cause legal harm to one another. The prevention of harm is the *raison d'etre* of the criminal law. What, then, constitutes harm? Mill states:

> [E]very one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. *This conduct consists, first, in not injuring the interests of one another; or rather certain interests, which, either by express legal provisions or tacit understanding, ought to be considered as rights;*[37] and secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing, at all costs to those who endeavour to withhold fulfilment... As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining such question when a person's conduct affects no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.[38]

Mill envisions what Rawls aptly described "a sphere of inviolability"[39] around each citizen, one in which the community has no right to impose itself; within this figurative space, the individual is sovereign. It is within this sphere of privacy that individuals are

given free reign to pursue their respective conceptions of the good life. Once the individual leaves this sphere of privacy, however, by engaging in activities that affect prejudicially the interests of specific others, the individual's conduct is subject to regulation by the State. Mill does not use, in the above passage, the modifier "specific," when describing the class of persons whose interests must be threatened in order to engage the regulatory powers of the State, but it is implicit.[40] If the individual's conduct could be regulated by virtue of its *hypothetical* impact upon *some* other person, the individual would effectively be stripped of any sphere of privacy whatsoever; one can conceive of *someone* being prejudicially affected, through some obscure line of causation, by the most apparently innocent of activities. It is also clear that the interests of others, the interference of which can engage the regulatory powers of the State, are not merely the interests people have in not being offended; on an abstract level, this would subordinate the individual's conception of the good to that of others. Moreover, on a more practical level, the fact that it is extremely difficult to predict what will offend any or all persons, would make it impossible for persons to live their lives and make reliable plans for the future.

In sum, harm must be *other-regarding* (as opposed to self-regarding) conduct that causes *real* (as opposed to constructive) damage to *identifiable* persons. Generally, it is understood that the State is limited to criminalizing conduct that harms persons and their property, and which harms the survival of the State itself, the State being the custodian of moral equality. Actions, which interfere with individual persons and their property, attack the building blocks of individual lives, the aspects of individual lives upon which persons depend to weigh risks and opportunities, and predict the future. In that the Rule

of Law is dedicated to equality of persons and, consequently, to their ability to plan their lives, such actions are properly subject to criminal sanctions.

The harm principle operates, in one sense, as merely a facet of the Rule of Law notion that the State's exercise of power, against the citizen, is constrained to instances where deprivation of the citizen's liberty is necessary in order to secure the equality of all citizens. In this sense, the harm principle is simply a shield against arbitrary or malicious State practice. In another sense, however, the harm principle functions as a sword, a legitimation of the use of State power against the individual. This is so, inasmuch as the State cannot be neutral as to citizens' capacity to exercise their will and moral agency; it must be neutral as to how this moral agency is exercised within the broad category of nonharmful activities, *but it is not entitled* to turn a blind eye to uses of power, by private individuals, that would undermine the status of other individuals as equals. Insofar as such acts have the effect of treating moral worthiness as a contingent product of social or cultural forces, private abuses of power strike at the very heart of the liberal State devoted to the perfection of individual conscience, choice and will. The harm principle ultimately sets broad limits upon both governmental intervention *and* non-intervention.

The Integrity of Law

The idea, that the Rule of Law requires the law to be a coherent whole, is one promulgated most forcefully by Dworkin.[41] On this view, the law as a whole must, if it is to avoid being, or appearing, arbitrary, be structured and interpreted as a "seamless, self-consistent unity."[42] As Allan notes, the requirement of integrity is more onerous than the requirement that like cases should be decided alike (*stare decisis*); the concept of

integrity requires judges to view *all* decisions and statutes as relevant to the determination of a given case, in the sense that all aspects of the law represent facets of one or more governing principles.[43] It is to these underlying, "hidden" principles that courts and legislatures owe their fealty, and it is to these principles that courts implicitly appeal when they decide cases. Thus, it is the responsibility of courts to interpret laws in such a way that these interpretations are consistent with the underlying principles, and *therefore also consistent with every other law*. Legislation at cross-purposes with, or reflective of utterly different ideas and values from, other laws, appear to have no clear purpose; it follows that an incoherent body of law must be deemed arbitrary. Selznick states:

> Rules are made arbitrarily when appropriate interests are not consulted and when there is no clear relation between the rule enunciated and the official end to be achieved. Rules are arbitrary when they reflect confused policies, are based on ignorance or error, and when they suggest no inherent principles of criticism. Discretion is arbitrary when it is whimsical, or governed by criteria extraneous to legitimate means or ends.[44]

Without recognizing some sort of guiding principle, *i.e.* equality, against which one may judge the appropriateness of a given law, there is nothing to speak either for or against that law.[45] It simply exists. This, however, presents a problem for citizens who want to plan their affairs in accordance with the law, because an arbitrary body of law may metamorphose in strange and unpredictable ways; it may unexpectedly trap individuals who have entered into a course of action on the basis of their understanding of the law. The bottom line, then, is that, in the absence of some guiding principle, around which the law is constructed or interpreted, citizens cannot feel secure in their plans. The State could always use the absence of some organizing principle to construct a law that negatively affects some people disproportionately.

No *Ex Post Facto* Laws

The Rule of Law is grounded, first and foremost, in the idea that the moral agency of individuals ought not to be debased or devalued through the *in terrorem* threat of sanctions imposed *ex post facto* by the State. This is expressed in the principle of *nulla crimen, nulla poena sine lege*: "no crime, no punishment without law." The assurance, that the State will not attach, *ex post facto* and with retroactive application, negative consequences to morally-charged projects, empowers individuals more fully to explore the content and limits of their respective wills and agency. This reflects the understanding that moral agents, though they may attempt to "do the right thing," may nonetheless innocently fail in this attempt.[46] Since one's status as a moral agent, being inalienable, is not affected by such failures, it follows that respect for the dignity and agency of the subject requires that, before sanctions can be levied against anyone, the State must take steps to inform the individual, prior to initial performance, as to what acts are prohibited:

> If... persons are punished under laws they could not have known about when acting, this not merely undermines the preconditions of informed choice and planning, it also disregards the limits of human responsibility and is therefore both unfair and an affront to human dignity. Thus, the values that cluster around predictability are not merely instrumental.[47]

The Rule of Law ensures that citizens are warned as to which acts are considered harmful and are to be prohibited by the State.[48] At the same time, the Rule of Law ensures that citizens are equipped with a stable sense of their rights, as against the State and other citizens, such that they are not prevented from living their lives by virtue of the paralyzing fear that some entity, deemed after the fact not subject to the laws in force, will interfere with them in some way. The Rule of Law is the practice not merely of

constraining State power, but also of constraining the power of individuals to act against each other. While the Rule of Law is indeed concerned with liberty, this concern is itself merely a derivation from a more pervasive concern for the dignity owed to moral agents. Francis A. Allen states:

> A fundamental end of a legal system in a liberal society is to contribute to conditions consistent with a sturdy sense of autonomy and personhood in its members, individuals capable of directing their own lives and destinies and of making their contributions to civic well-being. These basic objectives are imperiled by rampant criminality and by arbitrary responses of countervailing force by police officers or by laws so uncertain in their meanings and applications as to weaken the sense of security of individual members of society.[49]

How does this respect, for the moral agency of citizens, "cash out" as a devotion to the State treatment of citizens as equals? It does so inasmuch as it entitles different individuals, with varying degrees of political and social power, to pursue their distinct conceptions of the good within the broad limits codified in law. As the Rule of Law removes the possibility that persons with alternative conceptions of the good will be persecuted, after the fact, for their views and practices, the Rule of Law accords an opportunity for those ways of life to gain a foothold in the public consciousness. In this way, the Rule of Law makes possible the equal participation, of all individuals, in the political and cultural development of the community.[50] The "chilling effect" that *ex post facto* legislation or improperly applied legislation may have upon individuals' self-realization and the contribution to the community which such realization entails, is negated by the institutional requirements of the Rule of Law.

Generality of Laws

The Rule of Law embodies a respect for the equality of citizens by requiring the State to treat all persons equally, irrespective of social, racial or ethnic status, and without any attention paid to a given individual's political ideology:

> Although the point seems not often made, the *nulla poena* principle has important implications not only for the procedures of justice but also for the substantive criminal law. It speaks to the questions, What is a crime? and Who is the criminal? The *nulla poena* principle assumes that persons become criminals because of their acts, not simply because of who or what they are. One purpose of fair notice to the community, explicit in the principle, is to ensure opportunities for its members to avoid criminal sanctions by adapting their conduct to the law's requirements.[51]

The notion, that a person must not be punished unless he has violated a pre-existing law, assumes that no person is *inherently* criminal. All persons are presumed equally capable of obeying the law and peacefully co-existing with other members of the community. Indeed, on the liberal view, what other presumption could be in effect? Inasmuch as liberalism denies the relevance of difference, it forbids the consideration of personal characteristics in the determination of rights against the exercise of State force. Hence, the Rule of Law requires that the State only enact laws with general application. Laws designed to affect only certain individuals, *i.e.* bills of attainder, are invalid exercises of State power.[52] Such laws are contrary, on their face, to the notion that all individuals are equal; they make it impossible for citizens to plan their affairs, confident in their rights against the State and one another, because they deny that rights are anything but contingent upon certain political and social circumstances.

Due Process, *Stare Decisis*, and the Punishment Constraint

Part and parcel of the generality requirement, is the requirement of due process. Whereas the generality requirement demands that all persons be equally subject to the

law, the due process demands that the laws be applied in a like fashion to all citizens. To ensure the neutral and even application of the law, such that the State *in fact* treats its citizens equally and with regard only to their respective characteristics as moral agents, it is necessary that trials and hearings be conducted in an "orderly" fashion, that is, that criminal proceedings be conducted according to a stable and fixed procedure, commonly distinguished as "due process." As Rawls states:

> If laws are directives addressed to rational persons for their guidance, courts must be concerned to apply and to enforce these rules in an appropriate way. A conscientious effort must be made to determine whether an infraction has taken place and to impose the correct penalty. Thus, a legal system must make provisions for conducting orderly trials and hearings; it must contain rules of evidence that guarantee rational procedures of inquiry. While there are variations in these procedures, the rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances. For example, judges must be independent and impartial, and no man may judge his own case. Trials must be fair and open, but not prejudiced by public clamor. The precepts of natural justice are to insure that the legal order will be impartially and regularly maintained.[53]

Due process constraints on powers of arrest, detention, trial, and punishment instill confidence in citizens that they are subject to penalties only if they violate the laws codified and in force. Where courts have untrammeled discretion over the procedure to be undertaken in a given case, there is virtually nothing to prevent a trier of fact's bias or misapprehension from determining the question of guilt or innocence. It follows that the purpose of the Rule of Law, to guide the conduct of individuals, will be subverted:

> If judges at point of application are relatively free simply to change or make up the law as they go along, then rules displaying formal attributes, a congruent methodology of interpretation, reliable fact-finding, the virtues of an accessible, impartial and independent judiciary and most of the other machinery for securing the rule of law will simply fail to secure their ultimate end. When judges modify existing law at point of application, we necessarily lose many virtues of the rule of law, including: the generation of meaningful and "guidesome" legal reasons for action from the day the law goes into effect, the predictability and fairness to affected persons that goes with this, and consistent treatment of similarly situated people before the law.[54]

It is for just these reasons that *stare decisis* and the confinement of courts to interpretation, are required by the Rule of Law. Were courts entitled to create new law at the point of application, individuals would forever be uncertain as to the standard of conduct by which they would be judged. Where the law is not merely interpreted but created by courts, individuals are unable to tailor their conduct to the law insofar as it is unclear, until and unless they are judged, what is the law. Likewise, if courts do not follow a uniform interpretation of the law, it is impossible for individuals to know when their conduct will be deemed to run afoul of the legislation in question.

Furthermore, given that the purpose of the Rule of Law is to secure equal treatment of citizens, it has something to say about the type of procedures that ought to be adopted in the criminal law context. For instance, the burden of proof must lay upon the shoulders of the prosecuting authority, rather than the accused. Were this otherwise, the public would be uncertain as to whether the law was being applied evenly and equally, or whether certain courts and judges were, as a result of bias and/or malice towards certain individuals or groups, deliberately rejecting evidence of the individual's innocence. Moreover, were the accused to bear the burden of proof, it would often be impossible positively to establish innocence even where the accused is in fact innocent of the charges in question. The State, then, would be encouraged to arrest or detain persons at random, in the hope of terrorizing citizens into bowing to the will of those in power. Thus, the central defining principle of criminal due process, is that rules of evidence should be weighted in such a way that it is more likely that a guilty person will be wrongly acquitted than an innocent person will be wrongly convicted. Reiman explains how the

nulla poena principle entails what he and Ernest van den Haag call "the punishment constraint:"

> [E]stablishing a strong tie between guilt and punishment gives people effective control over whether they get punished. If I can be certain that my government will take every precaution against punishing me when I am innocent, then I have a dependable way of avoiding being punished: avoiding crime.[55]

Without due process constraints on State power, the individual could have little or no confidence in the *bona fide* nature of arrests and punishments. There would be nothing to ensure that, while the legislative bodies of the State imposed no *ex post facto* laws upon the citizenry, the law enforcement and judicial arms of the State would not incorrectly or maliciously "interpret" pre-existing laws in such a way as effectively to create new law at the point of application. This, in turn, raises the specter that such applications of the law are politically motivated and directed towards the promotion of certain conceptions of the good over certain others. There would be a "chilling effect" in the equal participation of various individuals in the development of the community and in their self-realization.

Beyond Due Process: Appellate Review and the Prerogative of Mercy

The assurance of the citizen, that the law will be applied properly and that one will therefore only be punished for a pre-articulated reason, also requires of the Rule of Law that there be some mechanism by which State legislation and its application is subject to impartial and independent review. This aspect of the Rule of Law is rarely acknowledged,[56] but, as will be explored briefly in Chapter III.1, it is crucial to the proper administration of the criminal justice system. In the absence of a strong power of review, on appeals from conviction, the Rule of Law requires some sort of "mercy" provision, applied evenly and meaningfully to all. The idea, that the prerogative of mercy is a facet

of the Rule of Law, is in some ways counter-intuitive insofar as it seems to be a means of negating due process, a means of rendering some people less accountable to the law than others. It is admitted that the prerogative of mercy is perhaps incompatible with the Rule of Law where the mechanisms of judicial and appellate review are weak and inadequate; as will be observed in Chapter III.1, the Rule of Law must include, as well as the elements listed above, some notion of finality of cases such that a judgment, reached in accordance with institutional requirements, ought not to be thrown into question by the injection of sentiment into the criminal justice system. This caveat aside, though, the prerogative of mercy need not represent baseless sentiment; it may, indeed should, be grounded in a fixed procedure and subject to judicial review.[57] Furthermore, where standards of appellate review are such that there is no judicial supervision of trials, and therefore no means of ensuring that the requirements of due process have been satisfied, there must be some way of protecting the punishment constraint. At stake is the liberal State's legitimacy as an enforcer of the equal rights of citizens.

Division of Powers

It goes without saying that neither due process nor appellate review can meet the standards demanded by the Rule of Law unless the courts that administer the law are independent and impartial tribunals. This means that judges must be free of State interference and uninfluenced by the prevailing opinions of the community at large. Summers notes:

> [A] ... core institutional requirement of the rule of law... is an impartial and independent system of courts and similar tribunals with power, in cases of disputes, (1) to identify valid rules, (2) to interpret and apply these rules, and (3) to resolve any issues of fact that arise. Disputes of all three kinds must be resolved consistently and congruently with the

> content of antecedent rules. An impartial and independent system of courts is indispensable not only for this function, but is also a necessity if remedies and sanctions are to be imposed ultimately only by courts and similar tribunals. A legislative body cannot ultimately perform these functions. Nor can administrative officials unless special institutional steps are taken. This is because officials will themselves often be parties to disputes over validity, interpretation, and fact, and over available remedies and sanctions, and thus not be in an appropriate institutional position themselves to resolve such disputes, impartially, consistently, and congruently.[58]

In *R.* v. *Valente*,[59] the Supreme Court noted three main indicia of an independent tribunal: security of tenure, institutional independence, and financial security.[60] Renke explains why these are requirements of judicial independence and, therefore, the Rule of Law:

> Security of tenure is a readily comprehensible condition of judicial independence. If judges could be dismissed because their decisions offended the powerful, the judiciary (or at least those judges remaining on the bench) would neither be nor appear to be independent... Institutional independence concerning administrative matters bearing on the judicial function is a somewhat less obvious condition of independence, but important nonetheless. Judges must have a significant measure of control over the daily activities of judging (e.g. the assignment of judges to cases, the sittings of the court, the drawing of court lists). If judges whose decisions were unpopular were assigned only "safe" cases, or if they were forced to bear an unfair share of the division of judicial labour to compel them to retire, the judiciary would neither be nor be perceived to be independent.[61]

> The financial security condition... has two aspects. First, (it is said) judges must be afforded an adequate salary. Relatively high remuneration is, in part, a recruiting tool. Judicial compensation must be set at a level sufficiently high "to attract the best candidates to the bench." ... A high level of compensation (it is said) is also required to "reflect the importance of the office of judge." A connected claim is that a high level of salary is required to "preserve the mien" of the judicial office (i.e., judges must be put in a position to display a lifestyle commensurate with the high status of the judicial office)... Second, judicial compensation must not be subject to arbitrary interference. Some interpret this aspect of financial security to serve, in part, as an inducement to lawyers to leave private practice; lawyers would be less inclined to become judges id their compensation could be arbitrarily lowered. More importantly, this aspect of financial security prevents compensation from being used to control the judiciary.[62]

Likewise, as noted above, the judiciary must not be permitted to interpret the law in such a way that it has more or less co-opted the legislative process and enacted new law at the point of application. The purpose of the law is to guide the conduct of citizens; this is impossible if the law is unknown prior to trial. Furthermore, such a state of affairs would

encourage the State's police and prosecutorial arms to "try their luck" in the courts and subject individuals to gross deprivations of liberty and denials of equal protection.

The Justification of Punishment

If one constructs a criminal justice system on the framework described above, it will follow that the State *may* be entitled to punish those who violate the law through the commission of some harmful act prohibited by the State. Indeed, Rawls defines the very concept of punishment in such a way that it is intrinsically bound up in the harm principle and the Rule of Law:

> I begin by defining the institution of punishment as follows: a person is said to suffer punishment when he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offense.[63]

As a pre-condition to the justifiability of punishment, the individual being punished must have had all the advantages accruing to him as a result of the Rule of Law. Once this pre-condition has been satisfied, the State is then morally entitled, within certain limits, to punish "the offender." It has been noted at various points above, that the purpose of the criminal law is to defend the moral equality of citizens. When a prohibited harm is levied against an individual, it is the State's duty to "bring home" to both the perpetrator *and the victim*[64] that each is equal – no better and no worse – than the other. The State accomplishes this goal through punitive measures. Inasmuch as the State seeks to restore "the balance of power," however, it is constrained in the types of punishment available. Plainly inadequate or vicious punishments may either fail to restore this balance, or strip away the offender's sense of moral worth. What must be noticed is that this justification

of punishment is not merely utilitarian, in the sense that it seeks to "sacrifice" offenders for the sake of the community as a whole. Rather, punishment is required out of a commitment to the individual – including the offender – as an end in himself.

> What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality... that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself.[65]

It is in this sense that some speak of an offender's "right to punishment."[66] An individual's harmful act interferes with another's realization of a conception of the good. Since every person is equal, such interference amounts to an "across the board" denial of moral agency for *all* persons, including the offender himself. The offender, then, is not sacrificed; instead, it would be appropriate to say that the offender has been educated or instructed in the political morality of equality.[67]

Conclusion

In the chapters that follow, it will be argued – hopefully with some measure of force – that the Canadian approach to appellate review of convictions is inconsistent with Canada's status as a liberal democratic, Rule of Law State. In particular, it is the position of this paper that the Canadian approach denies citizens an effective process of appellate review commensurate with the liberal State's Rule of Law obligations. Furthermore, it will be argued, as adjuncts of this central claim, that (a) an inordinate weight has been placed upon the finality principle which, while crucial to the Rule of Law, has been wrongly expanded to interfere with the punishment constraint; (b) appellate courts' have

interpreted various sections of the *Criminal Code*, dealing with appellate powers of review, in such a way that the law cannot satisfy the integrity requirement of the Rule of Law; and (c) any shortcomings in the standards of appellate review, have not been offset by an effective prerogative of mercy, or through other procedural safeguards. If Canada's criminal justice system is to reflect its liberal democratic heritage, it must reform its appellate practices.

Chapter II
Appellate Review in Context

Introduction

This Chapter contextualizes the issue of appellate deference on questions of fact in criminal cases,[68] by exploring different jurisdictions' respective statutory and judicial approaches to the issue. Specifically, three jurisdictions will be examined: England, Australia, and Canada. It is the position of this paper that these jurisdictions have developed their respective standards of appellate review having confronted three central problems: (a) how to balance the need to curtail miscarriages of justice against the need for finality of cases; (b) how to effectively review convictions while continuing to incorporate community participation in the criminal justice system; and (c) how can appellate courts, in their review of convictions, take account of those aspects of criminal trials that are inherently unreviewable, particularly findings relating to demeanour.

II.1 Appellate Review of Convictions in England

The Criminal Appeal Act *of 1907*

Prior to 1907, persons convicted of indictable offences, in England, had no *right* of appeal. A convicted person could appeal only if the judge, who presided over the criminal trial, reserved a question of law for consideration by the Court for Crown Cases Reserved. Whether or not such a question of law was indeed reserved, was itself a matter over which the trial judge had utter discretion.[69] This changed with the *Criminal Appeal Act* of 1907,[70] which created the Court of Criminal Appeal, as well as determined its

structure and jurisdiction and the scope of its powers. Section 3 of the 1907 *Act* provides, for the first time in English history, a right of appeal against conviction,

> (a) on any ground of appeal which involves a question of law alone; and
>
> (b) with leave of the Court on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal.

Subsection 4(1), in turn, provides that the appellate Court could allow an appeal against conviction

> if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice.

The legislative history of the 1907 Act suggests that the *raison d'etre* for the Court of Criminal Appeals was a growing belief that *some* mechanism was required to prevent miscarriages of justice. Introducing the *Criminal Appeal Bill*, Attorney-General Sir John Walton made the following comments:

> It is proposed to end a controversy which at recurrent intervals for sixty years has engaged the attention of Parliament. The settlement which I invite the House to adopt will create appellate rights against convictions for crime, similar to those which exist in relation to adverse verdicts in civil causes. Liberty will thus be put upon an equality with property, and the consequences of judicial miscarriage will receive in each case similar protection... Various mitigating causes have tended to obviate the defective operation of an imperfect system... But justice has blundered. Innocent men have been convicted, and the number of the victims of judicial miscarriage during the last few years has not been inconsiderable... Public sympathy in recent striking instances has been aroused by the misfortunes of men who have been called upon to suffer that most terrible form of moral torture which confound the innocent with the guilty, and condemns them to a common fate... These considerations have led the Government to the conclusion that the time for some change has arrived.[71]

Reiterating the need to prevent miscarriages of justice, Lord Chancellor Loreburn offered a compelling case for allowing appeals on questions of fact as well as law:

> Everybody agrees that on questions of law there should be an appeal, but questions of law are very rare in criminal cases. It is nearly always a question of fact, either as the sole element or as the main ingredient in it. The reason for wishing to have an appeal on the question of fact is derived, in the first place, from the antecedent probability that human nature will make mistakes, or is liable to make mistakes, and that there ought to be some means of obtaining a skilled review in appropriate cases. It is a terrible thing for a man to be convicted. It ruins his future; his character is gone, and it causes infinite pain and anguish and misery to all who belong to him.
>
> But apart from the antecedent probability of error there is the acknowledged fact that error exists. We are constantly investigating in this House and in the Court of Appeal cases in which juries have gone wrong on questions of fact... If men are liable to go wrong in their judgment in civil causes, why are they not under similar liability in criminal cases?[72]

This legislative initiative, to rectify miscarriages of justice, was in turn the result of a number of high-profile wrongful convictions that seriously eroded the public's confidence in the criminal justice system.[73] Among these were the cases of Adolf Beck and George Edalji, which appear to have provided singular impetus for Parliamentary reform.

Adolf Beck was convicted of fraud in 1896 on the basis of the identification evidence of ten women; he was sentenced to seven years imprisonment. Beck maintained his innocence throughout the term of his incarceration, launching sixteen applications to the Home Secretary for review of his conviction; all were rejected. In 1904, three years after his release, Beck was again arrested on charges of fraud, again on the basis of identification evidence. He was convicted a second time. Before Beck could be sentenced, however, a second individual, who had been arrested on an unrelated matter, confessed to the offences for which Beck had been convicted. Beck was pardoned for both convictions, and was given compensation amounting to L5000. A committee of inquiry was created to investigate the cases.[74]

Edalji was a solicitor, of ethnic descent, anonymously identified as the person responsible for having maimed a number of horses and cattle. He had an alibi, a physical disability, and no motive; moreover, while awaiting trial in custody, horses and cattle continued to be maimed. Nonetheless, Edalji was convicted and sentenced to seven years imprisonment. After great public pressure, Edalji was released from prison after serving only three years of his sentence; no explanation was given, by the Home Secretary, for his release. Sir Arthur Conan Doyle, on Edalji's behalf, applied considerable public pressure to the Home Office, which ultimately conducted a formal inquiry into Edalji's conviction. The inquiry report concluded that "the conviction was unsatisfactory."[75] Edalji was eventually pardoned, though never compensated.[76]

Judicial Treatment of the Criminal Appeal Act *1907*

Many of the early decisions of the Court of Criminal Appeal, not surprisingly, were largely concerned with defining the scope of the Court's jurisdiction to allow appeals. The Court often noted that it was "not authorized to retry the case." At the same time, however, it would often, though inconsistently, set aside convictions even where the verdicts in question were not unreasonable *per se*, but merely suspect.[77] The Court would often refer to the "safeness" or "satisfactoriness" of a verdict as opposed to its reasonableness. For instance, in *Bradley*, the Court overturned the conviction, stating that "[o]n the whole we think it *safer* that the conviction should not be allowed to stand. [emphasis added]"[78] In *Parker*, the Court specifically held that there was sufficient evidence, on the record, to support a conviction and, therefore, that it was *prima facie* reasonable; nonetheless, the Court further held that there was "sufficient doubt as to the accuracy of the verdict for us to give the appellant the benefit of it."[79] In *Hart*, the Court

reversed the conviction, despite its inability to articulate the precise problem that was to be remedied through this reversal:

> It is just one of those cases where it is difficult to say which is the exact piece of evidence that leaves an unsatisfactory impression on the mind. The Court has power to allow an appeal if it cannot be supported, having regard to the evidence, and looking at the whole of the evidence... we have come to the conclusion that this was not a satisfactory verdict, and that, therefore, the conviction must be quashed.[80]

In *Baskerville*, the Court held that it had jurisdiction to quash a conviction even where there was no legal or procedural error at trial. The test to be applied was whether "after considering all the circumstances of the case, [the Court] thinks the verdict 'unreasonable' or that it 'cannot be supported having regard to the evidence.'"[81] This decision was echoed in *Wallace*, where the Court held that, notwithstanding the "complete fairness and accuracy" of the trial judge's charge, the conviction should be quashed on the basis that "the case against the appellant... was not proved with that certainty which is necessary to justify a verdict of guilty."[82] The common thread is the notion that the appellate Court has the jurisdiction to re-weigh evidence and determine the extent to which the Crown has proved its case against the appellant; the Court is *not* confined to the question of whether there was sufficient evidence, if believed, to support a conviction.[83]

The Criminal Appeal Act *1968*

In 1964, the Donovan Committee was formed by the Lord Chancellor and the Home Secretary to critically examine, *inter alia*, the Court of Criminal Appeal's interpretation of its jurisdiction to overturn convictions. The Committee worded the central issue in the following terms:

> [W]hether the Court is, or should be, debarred from interfering with a jury's verdict because there was some evidence to support it, and because it cannot therefore be described as unreasonable.[84]

The Committee, in considering the issue, noted that Parliament, in drafting the *Criminal Appeal Act* 1907, had specifically rejected the use of the phrase "unsafe or unsatisfactory" as descriptive of the sort of verdicts that should be overturned by the Court.[85] This being the case, the Committee found it compelling that the Court had given itself the authority to interfere with those verdicts matching such a description.[86] The Lord Chief Justice of England himself suggested that the formal wording of s. 4(1) of the *Criminal Appeal Act* 1907 was no bar to the overturning of verdicts that were not unreasonable in the strict sense:

> To say that we have not done it, and we ought to have power to do it is quite wrong. *It is done every day*... [emphasis added][87]

Persuaded by the clear support, within the judiciary, for wider powers to interfere with suspect convictions, the Committee recommended that the Court be authorized to allow an appeal in those cases where "it comes to the conclusion that the verdict is unsafe or unsatisfactory."[88] This recommendation was quickly adopted by the Legislature. The Lord Chancellor, an advocate for the amendments, echoed many of the sentiments and fears, concerning miscarriages of justice, expressed prior to the passage of the originating 1907 Act:

> There has been a general feeling in the legal profession that if you go to the Court of Criminal Appeal for an obviously guilty client who has some technical point, if the technical point is good, then the guilty man gets off; but that if your only complaint is that your client is entirely innocent and had nothing at all to do with the crime, then it is much more difficult.[89]

When the *Criminal Appeal Act* 1968[90] came into force, the Court's[91] power to overturn suspect convictions was greatly expanded (if only in writing). Section 2(1) of the 1968

Act lists the new conditions under which the Court has a responsibility to interfere with convictions:

> Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think –
>
> (a) that the [conviction][92] should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
>
> (b) that the judgment of the court of trial should be set aside on the ground of any wrong decision of any question of law; or
>
> (c) that there was a material irregularity in the course of the trial…

These powers were, however, subject to this proviso:

> [T]he Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.

Given the fact that these "new" appellate powers were themselves the creation of the Court of Criminal Appeal, it is scarcely surprising that the Court interpreted section 2(1) in a broad manner. In the now famous case of *R.* v. *Cooper*,[93] the Court determined that, pursuant to subsection 2(1)(a), it had jurisdiction to interfere with convictions where it has a "lurking doubt" as to guilt:

> [I]n cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.[94]

The Miscarriages of Justice *Report*

In 1989, the U.K. organization 'Justice' released a report entitled *Miscarriages of Justice*.[95] This document tallied 37 cases between 1980 and 1987, involving approximately 49 persons, which were referred to the Court of Appeal, by the Home Secretary, after fresh evidence suggested that the persons respectively involved may have been wrongfully convicted. During this same period of time, the Home Secretary

compensated 60 persons who had been wrongfully convicted. Each year, 'Justice' investigates the correctness of approximately 50 convictions; of these, it determines about 15 to be wrongful.

The Royal Commission on Criminal Justice Report[96]

In 1993, the Runciman Commission expressed a number of concerns with the construction of the 1968 provisions. These concerns arose out of "a group of sensational cases that... revealed the existence of serious miscarriages of justice in criminal, principally terrorist, trials that took place during the 1970s."[97] Among the difficulties was the apparent contradiction of s. 2(1): it seems clear that an unsafe verdict is functionally the same as a miscarriage of justice; how, then, is one to reconcile the apparent duty of the Court to overturn unsafe convictions, with the proviso that seems to entitle the Court to ignore the suspect nature of such convictions?[98] There is also some doubt as to whether or not "unsafe" and "unsatisfactory" are definitionally identical. Buxton notes that there may a *prima facie* distinction between these terms,[99] but that such a distinction, if it ever existed, has been ignored into oblivion:

> It was contemplated in passing in *Graham* (1975) 61 Cr. App. R. 292 at 295 that an irregularity occurring before or outside the trial might make the verdict of the jury unsatisfactory, but not unsafe. In the converse case, however, it is hard to see how a verdict that could be said to be unsafe would not also be unsatisfactory. These complications have in effect been ignored by using the two expressions interchangeably...[100]

Lastly, the relationship, within section 2(1), between subsections (a), (b), and (c) is somewhat ambiguous. Grounds for allowing an appeal on the basis of (b) or (c) would surely also be grounds for allowing an appeal on the basis of (a); if they were not such grounds, then they could not pass the "miscarriage of justice" test given in the proviso.[101] Should (b) and (c) be taken merely as aspects of (a), or should they be taken as separate

grounds of appeal? Is a "miscarriage of justice" resulting from an error of law or a material irregularity, less or more "unsafe" than an "unsafe or unsatisfactory" verdict? Is the former, as suggested above, merely a recapitulation of the concepts expressed in the latter? J.C. Smith has ably enunciated the interpretive problems posed by the section:

> The three alternatives are imprecise and overlap. Grounds (a) and (b) are impossible, and ground (c) difficult, to reconcile with the proviso. A court cannot think that a conviction or judgment should be set aside (grounds (a) and (b)) and at the same time dismiss the appeal because they consider that no miscarriage of justice has actually occurred. Either they think that the conviction or judgment should be set aside or they do not. If they do, they can hardly dismiss the appeal. If they do not think that the conviction should be set aside, they think that the appeal should be dismissed, leaving no room for the application of the proviso. Ground (c) implies there are irregularities and "material" irregularities. As the Act requires the Court to set aside the conviction where there was a material irregularity, "material" must imply a sufficient ground for doing so and there is the same difficulty as with grounds (a) and (b). If the words are given their ordinary meaning, the proviso is not truly a proviso at all but, at best, a reminder that there are some wrong decisions on questions of law (ground (b)) and some irregularities (ground (c)) which do not require a conviction to be set aside. Even that limited meaning can have no application to (a).[102]

Smith seems of the view that the 1968 version of section 2(1) is so internally inconsistent as to be incomprehensible. It is submitted, however, that, given the phraseological history of the provisions assigning jurisdiction to overturn convictions, and given the very complexity of section 2(1), one can infer that, far from being incomprehensible, the provision reflects a very specific intention on the part of Parliament. It must be remembered that, in the 1907 Act, the term "unsafe" was rejected as too unscientific. When the judiciary began to use the term "unsafe" to justify interfering with convictions, Parliament created the Donovan Committee to investigate this usage. When Parliament finally acquiesced in the Court's use of "unsafeness" language, it did so only within the context of a fairly complex provision – section 2(1). From these facts, one could infer that Parliament drafted section 2(1) as a means of creating "scientific" or principled parameters for the "safe-unsafe" paradigm, of constraining the influence of appellate

judges' subjective experiences upon the development of the law. Section 2(1) – if one presumes that the various grounds of appeal and the proviso, contained therein, do not conflict with one another in principle - creates as many as four subtle gradations or categories of (un)safeness, and slots each gradation or category into its own subsection or proviso. It effectively directs the Court to interfere with a conviction only where it can articulate its subjective doubts with a certain degree of sophistication and, in so doing, provide guidance to the Court in future cases. It demands that, if the Court is to rely on a subjective standard of review, it provide guidance to practitioners and other judges as to what *kind* of doubt must be generated in order to allow an appeal against conviction. It demands that the Court decide what kind of doubt meets this threshold in different cases, and thereafter allow appeals against conviction only where this threshold is satisfied. In other words, it purports to make subjective experience comply with the rigors of *stare decisis*.

Yet, as Buxton and Smith have argued, section 2(1) presents the Court of Appeal with grave interpretive difficulties, depending on the type of case brought before it. In trying, "scientifically," to articulate the "gut-level" principle that an "unsafe" conviction cannot stand, Parliament assigned the Court the unenviable task of collating and categorizing, with taxonomic precision, various shades of discomfort, anxiety, and doubt. Faced with such an unusual and well-nigh impossible responsibility, it is little wonder that the Court might err on the side of caution, and refuse to overturn an unsafe conviction at all, when to interfere would mean having to explain why such a conviction was unsafe; why it is unsafe and *not* unsatisfactory, *or* an error of law, *or* materially irregular; and why the proviso should *not* be applied. The *Runciman Report* describes the

Court's unwillingness to exercise the broad powers of review legislated by section 2(1) of the 1968 Act:

> In their evidence to us JUSTICE said that practitioners took the view that the court was reluctant to apply the "lurking doubt" test:
>
> > "Time and again JUSTICE has read counsel's advice on appeal to the effect that where the summing up has been impeccable and there are no mistakes of law, the Court of Appeal will not substitute its own opinion for that of the jury, however much it may disagree with it."[103]

Professor Malleson has suggested that the "real problem lay with the Court's *interpretation* of its powers, not the wording of the statute."[104] For reasons given above, this seems a terribly over-simplified, if superficially justified, explanation. Certainly, the Court must bear some responsibility for the interpretive quagmire in which it found itself, it being, through its early judgments, the very inspiration for the 1968 enactments! Certainly, too, one could be forgiven for wondering why the Court would have such trouble carving a broad interpretation out of these enactments (which seem to have been expressly designed for such a broad reading), when it managed a broad interpretation out of the comparatively conservative 1907 provisions. It is, however, relatively easy to draw a broad interpretation of one's jurisdiction; more perplexing is knowing *how such jurisdiction can be applied*. This is particularly so when one can only exercise one's powers by negotiating a maze of subtle abstractions. The "unsafe and unsatisfactory" terminology was introduced, by the Court, so that it would not be required to make subtle distinctions between levels or kinds of doubt, as section 2(1) may demand. Likewise, the phrase "lurking doubt" was introduced as a means of blunting the subtleties of section 2(1), and thereby freeing the Court from its many tangled threads. Yet the Court may properly have felt it inappropriate to blunt the provisions of section 2(1) altogether; the

drafting of both the 1907 and 1968 Acts reflect a Parliamentary will that appellate interference with convictions be undertaken according to some quasi-scientific measuring-stick. While section 2(1) ostensibly codified the more or less emotional/subjective test created by the Court ("unsafe and unsatisfactory"), it demanded an objective explanation or description of the emotions at play. Read in this way, section 2(1) represents an attempt to incorporate emotion into the Rule of Law – "this" emotional response to a case leads to a remedy under section 2(1)(a), whereas "that" one is covered by the proviso – and the result is predictable: a provision that complicates the subjective experience, that requires such a heightened level of self-awareness, that one's "lurking doubt" is itself beset by doubts! The paradox of section 2(1) is that, in codifying the subjective experience of the Court, it forces the Court to take what amounts to a "view from nowhere." That is, since the Court cannot act on its "gut" instincts without "sanitizing" them for insertion in a public discourse (and therefore without destroying the "gut" aspect of them), the Court is obliged to judge as though it collectively has no such instincts.

The Runciman Commission recommended, in its *Report*, that section 2(1) be greatly simplified so that the Court would no longer be required to engage in such a taxonomic exercise. It recommended that section 2(1) be amended such that a single ground for allowing an appeal against conviction would replace the three grounds set out in the 1968 Act. The sole question to be decided, the *Report* recommended, should be only whether the conviction in question "is or may be unsafe."[105]

The Criminal Appeal Act *1995*[106]

Taking into account the *Runciman Report*'s criticisms and recommendations, section 2(1) was indeed amended in 1995, the three grounds being replaced by a single ground. The wording of that single ground, however, differed somewhat from the phrase employed by the Runciman Commission in its *Report*.[107] The amended section 2(1) reads as follows:

> Subject to the provisions of this Act, the Court of Appeal -
> (a) shall allow an appeal against conviction if it thinks that the conviction is unsafe; and
> (b) shall dismiss such an appeal in any other case.

Parliament correctly ignored the "or may be" portion of the *Runciman Report*'s recommended amendment to section 2(1). The term "unsafe" refers to the *possibility* of error; if a verdict may be unsafe, then, by definition, it *is* unsafe. If a verdict that "may be unsafe" is *not* as unsafe as an "unsafe" verdict *simpliciter*, then one can only draw the conclusion that the recommended amendment purports to distinguish between levels of unsafeness, as does section 2(1) of the 1968 Act. The risk, then, is that the recommended amendment would constrain appellate review of convictions as did the 1968 Act, though perhaps to a lesser extent. Smith puts the matter in the following terms:

> ... [I]t is difficult to see what sensible meaning could be given to "or may be". A conviction is unsafe if the court has nothing more than a lurking doubt whether the appellant is guilty – that is, the Court thinks that he may have been wrongly convicted. What then is the difference between "We think that the appellant may have been wrongly convicted" and "We think it may be that the appellant may have been wrongly convicted"? Surely there is no difference. Either the Court has a lurking (or greater) doubt, or it does not. It is submitted that the government was right to insist on the words, "or may be", *which could have led only to confusion, and, possibly, to the Court feeling obliged to give a narrow meaning to "unsafe"*. [emphasis added][108]

The emphasized portion of this passage suggests that Smith would agree with the proposition given earlier, that the complex and nuanced quality of the 1968 provisions

ultimately resulted in a *de facto* higher standard of appellate deference, despite the *Cooper* ruling.

Judicial Treatment of the Amended Section 2(1)

Insofar as *Cooper* was decided in relation to section 2(1)(a) of the 1968 Act (an appeal shall be allowed where the conviction is "unsafe"), it remained good law after the 1995 amendments. In fact, it gained even greater force than it once had, since the 1995 amendments dictated that a safe-ness analysis must be undertaken in *every* case. The approach of *constrained* subjectivity, attempted in the 1968 Act, was abandoned with the substitution of a single ground of appeal in 1995. Smith describes the unpredictable nature of appeals decided according to a safe-ness, or "lurking doubt," standard of review:

> The test is highly subjective. In *Siddique* [1995] Crim. L. R. 875 the Court upheld a conviction for rape, declaring that they had no lurking doubt although there were many inconsistencies (defence counsel listed 24 examples) in the complainant's evidence at the trial or between her evidence and her witness statements. The Court was referred to the very similar case of *Watts* (No. 91/5133/Z4, Feb. 1, 1993) where the conviction was quashed, but said that "The judgment in *Watts*, however similar the facts as summarised may appear to have been, cannot bind us to reach a different conclusion in the present case from that which we do. There the court was left with a lurking doubt. Here, we conclude that the jury was entitled safely to reach the verdict which they did." There is no way of distinguishing the cases except that in one the Court felt a lurking doubt and in the other it did not. The outcome of an appeal may therefore be very difficult to predict and may be very dependent on the attitudes and predispositions of the individual members of the Court.[139]

Thus, the fears of Parliament, that an unreservedly subjective approach to reviewing convictions would be incompatible with the Rule of Law, were somewhat justified. Absent some requirement that the Court embark upon a sophisticated expression of its particular doubts in a given case, the subjective approach appears wholly unreliable as a means of preventing miscarriages of justice. It seems appropriate to return to the words

of Attorney-General Sir John Walton, introducing the original 1907 *Criminal Appeal Bill*: the purpose of the appeal against conviction was – and is - to (a) prevent miscarriages of justice; and (b) foster public confidence in the criminal justice system.[110] The approach of unfettered subjectivity can only questionably serve either purpose. First, only appellants who can engage the sympathy of the Court would seem capable of achieving an effective review of their respective convictions. The beauty of the 1968 provisions was their demand, upon the Court of Appeal, that it engage in a productive "soul-searching" each time it located, within itself, a doubt concerning the validity of a conviction. It required the Court to determine what aspect of the case in question generated its doubt, and how compelling was this doubt as justification for interference with the conviction. It could not result in *stare decisis*, in the traditional sense, but it could – at least theoretically – produce appellate judges who could distinguish a subjective doubt, honestly held as to the validity of a *conviction*, from a bias against the *individual* whose conviction was being reviewed.[111] It had the potential to constrain the power of judges in a way that a purely subjective approach cannot: presuming good faith on the part of appellate judges, it could reduce the possibility that the darker forces of subjectivity would reject an appeal based on prejudice against ethnicity or gender, or for some other reason attached to the appellant rather than her case.

Second, there are a number of reasons why a subjective standard of appellate review seems unable to increase public confidence in the criminal justice system. The quashing of convictions cannot increase public confidence in the criminal justice system if the quashing of that conviction cannot at the same time direct lower courts in such a way as to prevent future wrongful convictions. Without some consistent, principled

standard of conducting appellate reviews, how can the public trust appellate courts to consistently "catch" wrongful convictions? Lastly, without referring to some standard beyond the Court's own predispositions, how is the public to know whether or not a conviction deemed, by the Court, to be a miscarriage of justice, is *in fact* a miscarriage of justice and not a valid conviction overturned through the arbitrary exercise of power?

The above serves as a reminder of a fundamental principle: while justice done according to legal procedure may produce a wrongful conviction, justice cut loose from all procedural moorings *can scarcely be considered justice at all*. As Derrida has noted, the quest for justice involves a constant tension between adherence to the Rule of Law, and attention to the subjective doubts and fears that arise in the individual case:

> [F]or a decision to be just and responsible, it must... be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case.[112]

While one is free to conclude that the 1968 Act, notably section 2(1) therein, was nothing more than a poorly drafted piece of legislation, a more charitable reading would be that Parliament attempted, with that provision, to honour the Rule of Law by facing head-on the tension Derrida describes. It is unclear to what extent Parliament should be criticized for the judiciary's unwillingness to engage in a self-analysis dictated by the judiciary's own superficial embracing of a subjective standard, following the 1907 Act.

In *Graham et al.*,[113] the Court of Appeal defined its post-1995 jurisdiction to allow appeals against conviction:

> This new provision... is plainly intended to concentrate attention on one question: whether, *in the light of any arguments raised or evidence adduced on appeal*, the Court of Appeal considers a conviction unsafe. If the Court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence,

> that the conviction is safe, the Court will dismiss the appeal. But if, *for whatever reason*, the Court concludes that the appellant was wrongly convicted of the offence charged, *or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe*. The Court is then subject to a binding duty to allow the appeal. [emphasis added][114]

It would appear that the Court has voluntarily limited its reliance upon the subjective approach, for it here suggests that, as a precondition for the subjective approach, the appellant must raise a specific legal or factual argument. Thus, a simple recital of the circumstances of the conviction could not result in a successful appeal. It may be argued that the Court also suggests – with the phrase "for whatever reason" - that its jurisdiction, to allow appeals against conviction, may be plenary, that it can find a verdict unsafe, notwithstanding the fact that the Court's reasons for doing so were not first identified by the appellant. A more appropriate interpretation of that clause, however, given what precedes it in the above passage, is that the Court is constrained as to the circumstances in which it can engage in the subjective analysis of the conviction in question (that is, it must wait for the appellant to raise a *specific argument* that could trigger this analysis), but that the appellant is not constrained in the type of argument that it may raise as a means of activating the Court's subjective jurisdiction.[115] In short, the Court may allow an appeal against conviction for *any* reason that gives rise to a doubt concerning the propriety of the conviction, but that reason must find a basis in an argument provided by the appellant.

In *R.* v. *F.*,[116] the Court of Appeal held that the phrase "lurking doubt" should no longer be used. The Court held that, insofar as the amended section 2(1) had "the advantage of brevity and simplicity," it was inappropriate to "place a gloss on the test formulated by Parliament." This is somewhat curious, because the "lurking doubt"

standard was devised, in *Cooper*, within the context of the "unsafe and unsatisfactory" provision of the former section 2(1). The 1995 amendments did not alter the relevance or applicability of the *Cooper* decision, unless the omission of "unsatisfactory" materially affects its meaning. This seems unlikely only for the reason that Buxton gives, that the Court has used the terms "unsafe" and "unsatisfactory" more or less interchangeably.[117] One may, then, speculate that the Court abjured the use of the term "lurking doubt," not because the amendments rendered *Cooper* less relevant, but rather because the amended section 2(1) made the Court's approach so blatantly subjective, that the use of the term "lurking doubt" was wholly unnecessary and operated only to highlight the irrational nature of its analysis. This may have been useful when section 2(1) was more complicated and in need of a "human touch," but markedly less so with the 1995 amendments. Thus, the Court may have discarded the "lurking doubt" language because it had become *too relevant*; with its expanded jurisdiction to interfere with appeals, the Court may have been concerned that the public would perceive it as despotic if it did not somewhat mute the subjective language employed in its decisions.

The irony of *Graham et al*, and *R.* v. *F.*, is considerable. For almost 90 years, the Court of Criminal Appeal, and its successor, battled for a more subjective standard of review in an effort to curb miscarriages of justice and restore public confidence in the criminal justice system. Now that its jurisdiction is virtually boundless, the Court has worked to limit the obviousness of that jurisdiction by imposing pseudo-hurdles on appellants. Why? For no other reason than to improve its ability to remedy miscarriages of justice, and to heighten public confidence by referring to standards, by making the Court subject – if only in a weak sense - to the Rule of Law.

This irony, though, should not detract from the radical-ness of the *Graham* test. Inasmuch as it allows the Court to overturn a conviction where it is not satisfied that the appellant was rightly convicted, the Crown is accorded an almost unbearable tactical burden: *it must show that a jury ought not to have had a reasonable doubt as to guilt.* This seems such an incredibly onerous weight to impose upon the Crown, that one can scarcely believe that any convictions could ever be affirmed.

II. 2 Appellate Review of Convictions in Australia

Australia has no single statutory basis for appellate review of convictions. Rather, each province has legislation that conveys jurisdiction, upon its respective court of criminal appeal, to interfere with convictions. As in Canada,[118] the provisions assigning this authority employ language borrowed directly from s. 4(1) of the English *Criminal Appeal Act* 1907. Thus, Australian law requires an appellate court to overturn a conviction where (a) it is unreasonable or cannot be supported by the evidence; (b) there is a wrong decision on any question of law; or (c) a miscarriage of justice would result from upholding the conviction.[119]

Judicial Interpretation of Appellate Jurisdiction to Overturn Convictions

As did the English Court of Criminal Appeal, the High Court of Australia has consistently "read into" the Australian provisions a jurisdiction to overturn convictions where these are deemed "unsafe" or "unsatisfactory." Distinguishing the Australian approach to miscarriages of justice from that adopted by the English appellate courts, is an attitude that, while there exists a jurisdiction to interfere with unsafe convictions, this

jurisdiction should not be used except in rare cases. Much of the early case law attempts to identify precisely those situations where an "unsafe" verdict, subject to appellate interference, *could* arise; it does not suggest a general principle concerning where an appellate court *ought* to overturn convictions. In *McKay* v. *The King*,[120] the Court held that there were cases in which reliance upon a confession, absent corroboration, could give rise to an "unsafe" verdict; in such cases, if the jury was not issued a proper instruction as to the use to which it could put the confessional evidence, then an appellate court was entitled to overturn that conviction.[121] In *Davies and Cody* v. *The Queen*,[122] the Court endorsed the English standard of review.[123] While it did not explicitly approve the safeness standard as the applicable standard in Australia, it did conclude that identification evidence, owing to the dangers inherent in its use, could give rise to a miscarriage of justice unless the jury was properly instructed in its use. Where an improper jury instruction was issued, this possibility, of a miscarriage of justice, gave rise to appellate jurisdiction to interfere with that conviction.[124]

In *Raspor* v. *The Queen*,[125] the High Court offered this commentary on an appellate court's jurisdiction:

> Verdicts of course ought not to be, and are not in practice, set aside except upon very substantial grounds. But it is one thing to exercise powers with caution and discrimination and another to deny their existence.[126]

The Court appears to suggest that appellate courts have a wide jurisdiction to overturn convictions, but that this jurisdiction is nonetheless constrained by a quasi-moral obligation to exercise their powers of review sparingly. Appellate jurisdiction is to be exercised according to a subjective standard in the sense that individual judges may have

a different sense as to what constitutes an "unsafe" verdict. In *Plomp* v. *The Queen*,[127] Dixon C.J. refers to *Raspor* as support for this cryptic statement:

> Some of the expressions... tending to the view that the Court might not interfere if there was some sufficient evidence to support a verdict of guilty, however unsafe or unsatisfying it might be, *probably* are not correct... [emphasis added][128]

Dixon C.J. appears to make the claim that the scope of appellate jurisdiction to overturn convictions is an issue falling somewhat beyond the scope of issues that can be defined by the High Court. It is understandable that Dixon C.J. would hesitate to commit himself to a rigidly defined standard of review, given the Court's claim, in *Raspor*, that the boundaries of proper review are determined with reference to an appellate court's moral duties, as opposed to its legal entitlements. Thus, it could not be said that Australian jurisprudence mandates a "lurking doubt" standard of review in the same manner as does English case law.[129] Australian case law suggests that appellate jurisdiction is a cipher, an unknown constantly defined and re-defined by the values extant in the legal community at the moment. These values are instilled in appellate judges through their participation in a community devoted to the Rule of Law.[130] Australian case law often expresses a reluctance to overturn convictions. This reluctance, however, is a *social* norm and not a legal requirement. While this may appear a rather radical interpretation of *Raspor* and *Plomp*, it is difficult to see how the dictates of the Rule of Law could be otherwise construed as a moral obligation.

Interestingly enough, then, one can see Australian appellate courts attempting, as did the English Parliament, to make subjective standards of review obey objective constraints. Whereas, though, the English Parliament tried to force appellate subjectivity into legislated categories, the High Court of Australia attempts to regulate appellate

subjectivity using the influence of the legal community. The English Parliament attempted to constrain appellate subjectivity through the imposition of categories that were inadequately understood by the Courts that were to fill them. Paradoxically, in leaving the constraints undefined, the High Court renders them more coherent to the judges who are to honour them. The constraints are no more than the values of the legal community of which the appellate judge herself is a part; its values, then, are those of the judges as well. The constraints appeal to the subjective experience of those who are constrained.

At the same time, however, the High Court's approach gives the appellate court the look and feel of a *jury*. After all, a jury is nothing more than the collective representative of the *community* at large, the aspect of the criminal justice system that makes the law relevant by applying its precepts to the values currently holding sway in the community. An appellate court begins to look like just another jury reflecting just another community, interpreting the requirements of the law according to values that are neither fixed nor inexorable, but rather contingent and indeterminate. In *Ratten* v. *The Queen*,[131] Barwick C.J., writing for the High Court, described the appellate court's powers of review in such a way that any distinction, between the jury at first instance and the appellate court, would seem dissolved:

> There is a miscarriage if on the material before the court of criminal appeal... the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor... *If the court has a doubt, a reasonable jury should be of a like mind.* [emphasis added][132]

The significance of this view cannot be overstated. An appellate court is often forced into a position where it must presume that the jury considered factors not recorded on the

transcript (*i.e.* demeanour). This forecloses, to a certain extent, appellate review of convictions because an appellate court may be unable to say that a given fact-finding was unreasonable or unsupported by the evidence. *Ratten* allows an appellate court to ignore the "what-ifs" that plague review of convictions; the only question to be addressed is whether, given what the court *does* know, the court has a reasonable doubt as to guilt.

It would be wrong, though, to deny the insidious aspects of *Ratten*. An appellate court is invited to substitute its opinion for that of the jury; alternatively, it could be said that the legal community is invited to annex the community at large, to treat itself as the voice of the general public. If the English "lurking doubt" approach to appellate review represents an aristocracy in the sense that a given appellate court could overturn a public finding on the basis of some ill-defined doubt,[133] then the Australian system yet represents the aristocratic "trumping" of the public will by the more diffuse (and therefore more invisible) legal community. From the point of view of a public that is not part of the legal community, and therefore does not experience the constraints that its moral values impose upon appellate judges,[134] appellate review of convictions in Australia may appear just as arbitrary as that in England. One may rightly be concerned about the repute of the administration of justice. Indeed, in *Whitehorn* v. *The Queen*,[135] Dawson J., on behalf of the High Court, somewhat repudiated the notion that an appellate court need only experience a reasonable doubt in order to be justified in overturning a conviction. That is, Dawson J. criticized the proposition that the same doubt need be had for overturning a conviction, as need be had for ordering an acquittal at first instance.[136] Dawson J. noted that a jury "performs its function within the atmosphere of the particular trial which it may not be possible to reproduce upon appeal."[137] Thus, his complaint is

the legitimacy of a standard of appellate review that undercuts the democratic nature of criminal trials without commensurately offsetting that loss.

Chamberlain and Another v. The Queen (No. 2) ("The Dingo Case")[138]

The majority decision of the High Court, in *Chamberlain*, established that the *Ratten* test was no longer the law in Australia.[139] Instead, the majority followed *Whitehorn*, in holding that the test to be applied, on appellate review, is whether the jury, acting reasonably, must have, or should have, entertained a reasonable doubt as to guilt.[140] Brennan J., writing a concurring judgment, enunciated the test in the following terms:

> [U]pon the facts which the jury were entitled to find beyond a reasonable doubt, could a reasonable jury, employing their critical judgment of men and affairs, have been satisfied that the inference of guilt was the only inference to be drawn?[141]

Clearly, this standard far exceeds that enunciated in *Ratten*, which effectively ignored the entire issue of whether the jury had a doubt. Simply by placing back on the table the question of what the jury would have thought at trial, the High Court forces appellate courts to consider, once again, the possibility that a jury relied upon factors not recorded on the transcript.[142] Brennan J. suggests that an appellate court may only disregard the inferences that may be drawn by juries, where these inferences are based upon evidence that is inherently unreliable:

> The difficulty lies in identifying criteria for exercising that extraordinary power [to overturn convictions] while preserving the general principle that a Court of Criminal Appeal does not usurp the functions of the jury by setting aside the jury's verdict in any case where the court, considering the evidence presented before the jury at the trial and that evidence alone, entertains a reasonable doubt about the appellant's guilt. There must be some special character in the evidence upon which the jury has acted in finding the facts against the appellant which permits the court to intervene though the verdict is not unreasonable or it can be supported having regard to that evidence. Long curial experience has satisfied Courts of Criminal Appeal that some categories of evidence

> which a reasonable jury might act upon in returning a guilty verdict are frequently unsafe, and should be acted upon (if at all) only after the jury has been warned of the danger of acting on them. Those categories of evidence, as the court's experience shows, have a special character: apparently safe to act upon, but frequently unsafe in fact.[143]

The High Court, in *Chamberlain*, has returned to the approach which it implicitly adopted in *McKay* and *Davies*. Rather than laying down a principled test for determining when a verdict is unsafe, the Court has adopted an "I know it when I see it" approach to the concept. Nonetheless, the Court yet affirmed a safeness standard of review of convictions. Murphy J., writing a concurring judgment, comments:

> [I]nevitably, juries sometimes make mistakes. History demonstrates that in Australia as elsewhere, despite the protection of the jury system and other safeguards, sometimes the innocent are convicted. Because of such miscarriages courts of criminal appeal have been given the power to set aside convictions, not only where the judge wrongly admitted or rejected evidence, or misdirected the jury, but also where there was evidence which could justify the verdict, the appeal court considered it unsafe. The appellate system thus operates as a further safeguard against the mistaken conviction of the innocent.[144]

While the High Court has consistently stated that a safeness standard of review is the correct one, its conception of the meaning of this standard mean, and when it entitles an appellate court to reverse a conviction, differ markedly. An English appellate court is to treat a verdict as unsafe, where the Court itself has a "lurking doubt" as to guilt;[145] this places the tactical burden of proof upon the Crown, and gives the Court jurisdiction to interfere with a conviction in virtually every case that comes before it. An Australian appellate court is to treat a verdict as unsafe where it concludes that the evidence, *from the perspective of the jury at first instance*, was so *inherently frail* that, absent some specific warning that removed this frailty, a reasonable jury could not do otherwise than acquit. Thus, cases that do not involve inherently frail evidence (*i.e.* identification evidence, confessions) involve a *de facto* higher standard of review.

In *M.* v. *The Queen*,[146] the High Court re-affirmed this two-tiered standard of appellate review, but expanded the definition of "unsafe." Mason C.J., speaking for the majority, states:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inconsistencies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside the verdict based upon that evidence. In doing so, the court is not substituting trial by court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[147]

Testimonial evidence will be deemed inherently unreliable where the face of the record demonstrates that a positive finding of demeanour could not render that evidence credible (*i.e.* where the testimony is internally inconsistent or motivated by gain). Where an appellate court finds that a conviction was based upon such testimonial evidence, it is entitled to find that the conviction is unsafe and reverse the conviction. Where, however, an appellate court encounters a case in which Crown evidence may have been rendered credible through a finding relating to demeanour, that court can only overturn the conviction if it concludes that a reasonable jury could not convict on the evidence, that is, if the Crown failed to proffer evidence going to an element of the offence.

II.3 Appellate Review of Convictions in Canada

The Criminal Code 1892 - Present

In 1892, Canada legislated its first *Criminal Code*. Prior to the passage of the *Code*, it was possible to appeal a conviction through obtaining a writ of error on a question of law; the trial judge could also reserve an appeal on a question of law. The *Code* swept away the writ of error, but retained the trial judge's right to reserve questions of law.[148] Furthermore, the *Code* created a new remedy: the ability, of the trial judge, to reserve questions of fact, that is, to grant leave to appeal "on the ground that the verdict was against the weight of evidence."[149]

In 1923, Parliament overhauled the entire *Criminal Code*,[150] with sweeping amendments to, *inter alia*, appeals in indictable cases. The scope of appellate jurisdiction, as laid out in the former sections 743 and 747, were altered to mirror the provisions of sections 3 and 4 of the English *Criminal Appeal Act* 1907.[151] As in England, Canadian appellate courts were statutorily authorized to interfere with a conviction "on the ground that it is unreasonable or cannot be supported by the evidence." One could infer, from Parliamentary references to Beck and Edalji,[152] that, as in England, the chief reason for this expanded appellate jurisdiction was the desire to prevent miscarriages of justice.[153]

Strikingly, this brief history represents the *entire* legislative history, in Canada, of appeals on questions of fact. The power to overturn a conviction "on the ground that it is unreasonable or cannot be supported by the evidence" has remained unchanged to the present day.[154]

Judicial Interpretation of the Scope of Appellate Power 1923 - 1973

The language of safe-ness was employed by Canadian appellate courts during much of the twentieth century. In *R.* v. *Epstein et al.*,[155] and *R.* v. *Derby*,[156] the Ontario and Alberta Courts of Appeal, respectively, applied what would appear to be a "lurking doubt" standard of review, relying upon their own respective doubts to overturn the convictions. These were two extremely early cases, and are anomalies in the twenty years immediately following the coming into force of the 1923 *Criminal Code*. Yet, beginning in 1946 with *R.* v. *Yates*,[157] Canadian appellate courts consistently relied upon the interpretation, employed by the English Court of Criminal Appeal, as to the scope of its authority to overturn convictions. In *R.* v. *Lovering*,[158] the Ontario Court of Appeal borrowed the language used in *Wallace*,[159] quashing a conviction on the ground that the Crown had not proven its case "with that certainty which is necessary to justify a verdict of guilty."[160] The British Columbia Court of Appeal also applied this reasoning in *R.* v. *Harrison*[161] and *R.* v. *McDonald*.[162] In *McDonald*, the Court made the following comments regarding its jurisdiction:

> The tread of interpretation of this subsection founded in the reasons for its introduction and later in Canada... is not to limit the jurisdiction of the Court of Appeal only to those cases in which there is no evidence (for then of course there would have been no need of this subsection[163]), but to include cases in which there is "some evidence", that is, when such evidence "in the opinion" (and the final character of these statutory words is emphasized) of the Court of Appeal, is of a kind, description, or character that the Court of Appeal as the statutory judge of fact as well as law, cannot resist the conclusion it is *unsafe* to rest a conviction thereon. [emphasis added][164]

In *R.* v. *Boyd*[165] and *R.* v. *Groulx*,[166] the Ontario Court of Appeal interfered with the respective convictions, because the evidence upon which they were respectively based were of a quality that rendered them "unsafe." Until the 1973 Supreme Court decision of

R. v. *Corbett*,[167] it would seem that "safeness" was the main standard of appellate review of convictions.[168]

R. v. Corbett

What is the Test Laid Down by the Majority?

The "safeness" standard of review was effectively swept aside with the Supreme Court's judgment in *Corbett*. At the British Columbia Court of Appeal, Robertson J.A., in dissent, held that the test of "unsafeness" was the appropriate standard of review under section 613(1)(a)(i)[169] of the *Criminal Code*. Robertson J.A. relied upon both English and Canadian authorities for this proposition.[170] On appeal to the Supreme Court, Pigeon J., writing for the majority, laid down the standard of appellate review on questions of fact:

> The function of the Court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.[171]

The impact of this statement was marked. It was interpreted by provincial appellate courts as a narrowing of their jurisdiction to interfere with convictions on the basis of a perceived error of fact.[172] Yet several aspects of Pigeon J.'s judgment give pause. Specifically, it is unclear that the phrase "acting judicially" does not – or at least may not - imply a "safeness" standard of review. Moreover, Pigeon J. implicitly endorses Robertson J.A.'s conclusion as to an appellate court's jurisdiction. He states that it is "not… necessary to review [Robertson J.A.'s] authorities," because these do not "differ from what I have stated to be the proper view of the law."[173] Pigeon J. even goes so far as to say that the appeal is dismissed only because Robertson J.A.'s "view of the facts" was erroneous, as opposed to his view of the law. Finally, Pigeon J. cites the final

passage from Robertson J.A.'s dissent, offering no remarks as to the appropriateness of the language employed therein:

> Summing up my view, the testimony put forward in support of the Crown's case was too *unsafe*, its nature was too *dubious*, to rest a conviction on it, and the verdict was, therefore, unreasonable and not supported by the evidence. [emphasis added][174]

Of course, all of the above is only relevant if Pigeon J. correctly interpreted what is Robertson J.A.'s view of an appellate court's jurisdiction to allow appeals against conviction on questions of fact. Pigeon J. provides this interpretation of what Robertson J.A. means by an "unsafeness" standard of review:

> I do not read [Robertson J.A.'s dissent] as meaning that the duty of the Court of Appeal is to reach its opinion on the basis of what its members think they would have decided if sitting as the jury so that, *if they are not convinced that they would have rendered the same verdict, they are to find it unreasonable*. If that is what the learned judge meant, then I must disagree with him because that is not the proper test. As previously noted, the question is whether the verdict is unreasonable, not whether it is unjustified.[175] The function of the court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered. [emphasis added]

Pigeon J. suggests that the incorrect view of the law would be that which places the burden of justifying the conviction upon the Crown. There is a presumption that the result achieved at trial is the proper result and it falls to the appellant, in a given case, to demonstrate to the appellate court that the conviction represents a miscarriage of justice.[176] Pigeon J. does not specify what burden of proof, that is, what exactly an appellant needs to show in order to succeed in her appeal. One can infer generally, though, that an appellate court is not entitled to find a verdict to be "unsafe" in just *any* circumstance; there must be some *identifiable* deficiency - identified by the *appellant* - in the evidence that accrues such jurisdiction to the Court.[177] Hence, on Pigeon J.'s reading, an "unsafeness" standard of review amounts to *constrained* subjectivity on the part of appellate courts.[178]

"It is Not the Function of the Court to Substitute Itself for the Jury..."

It seems appropriate, too, to comment upon Pigeon J.'s suggestion that "[i]t is not the function of the Court to substitute itself for the jury." Note that Pigeon J., here, seems only to say that appellate courts should not conduct their reviews of verdicts, as though they were juries. What does this mean? Perhaps Laskin J. (as he then was) provides some clarification in his dissent, where he approves the British Columbia Court of Appeal's statement, in *Inglehart*, of appellate jurisdiction:

> *It is not the function of the Court to retry an appellant or decide his innocence or guilt. That is for the jury.* [emphasis added][179]

Where an appellate court reviews the propriety of a conviction, it is not determining whether or not the appellant is guilty or innocent.[180] It is deciding something altogether different, namely, whether the evidence was such that the question of guilt or innocence ought to have been brought to the jury in the first place.[181] When deciding this question, the Court is not to examine the evidence in a vacuum, but rather in the context of fresh evidence brought before it and other circumstances (or non-circumstances) that could affect the way in which the jury viewed this evidence. For this reason, an appellate court's jurisdiction to overturn convictions is properly greater than a preliminary hearing judge's power to order a trial: from the latter's position, a presumption must be made that the jury will experience the evidence in an even-handed fashion.[182]

It follows from the above that the Court's role, as differentiated from that of the jury, both empowers the Court, and restricts it, as concerns the adjudication of facts. The main restriction, of course, is that an appellate court may be unable to fairly judge whether the Crown's case ought to have been brought before the jury. This is especially

so where credibility is the central issue and the jury must make findings relating to the demeanour of witnesses. Inasmuch as the appellate court can rely only upon the trial transcript, a notoriously inadequate medium for conveying subtleties in a witness' testimony, an appellate court may be obliged to accept the trial fact-finder's "word" that there was a reasonable basis for believing a Crown witness over a defence witness, or a reason for disregarding a potentially devastating cross-examination of a Crown witness. In such cases, the appellate court must presume that the evidence, upon which the jury relied in issuing a conviction, was sufficient.[183]

On the other hand, the appellate court has a number of advantages over the jury. It has the advantage of perspective, that is, experience with similar cases that allow it to - one would expect – better evaluate the usefulness or probative value of certain kinds of evidence.[184] Arguably, though not uncontroversially, the very notion of what it means to "act judicially" entails the proper evaluation of the usefulness of such evidence; it seems counter-intuitive to suppose that a jury could accept, *at face-value* (without more) suspect evidence (*i.e.* jailhouse informant testimony) and still be said to have acted judicially. A panel of judges would seem ideally suited to decide whether a trier of fact could be said to have acted judicially in basing certain inferences upon certain types of evidence, without more. Furthermore, the appellate court has the opportunity to hear evidence not heard by the jury at trial.[185] Thus, the statement, that an appellate court is not to substitute itself for the jury, is not, by itself, condemnation of the broad exercise of the power to review convictions. At most, it amounts to a reminder that an appellate court is to review only the conditions of a conviction, and not the conviction itself. Inferences of fact (*i.e.* verdicts) are subject to appellate review only to the extent to which the appellate

court determines that evidence of primary facts, upon which the verdict is ultimately based, lacks a requisite degree of corroboration or certainty.[186] If the probative value of a given piece of evidence is, within the experience of the Court and given the totality of the circumstances of the case, low, then, depending upon the importance of the suspect evidence to the Crown's case, the conditions of the conviction in question are such that the conviction is *unsafe* and therefore "unreasonable." This is consistent with the above interpretation of Pigeon J.'s judgment, in *Corbett*, insofar as one supposes that a lack of corroboration constitutes a deficiency in the evidence such that the appellate court has jurisdiction in the first place.[187]

Yebes v. The Queen

The above notwithstanding, it was generally agreed, by provincial appellate courts, that the Supreme Court's decision in *Corbett* directed a dramatically narrowed standard of appellate review in criminal cases. In *Moore*, Lambert J.A., speaking for the majority of the British Columbia Court of Appeal, provided this interpretation of the effect of Pigeon J.'s judgment:

> The application of *Corbett*... requires the weighing of evidence by a Court of Appeal so that the court may satisfy itself as to whether the verdict is one that *no* trier of fact, deciding whether the prosecution had established its case beyond a reasonable doubt, *could possibly have reached*.[188]

In *Moore*, the Court effectively ruled that, if there was *any* evidence on all elements of the offence in question, an appellate court could not interfere with the conviction. The Supreme Court dispelled the notion that such an extremely high test, as that enunciated in *Moore*, needed to be satisfied. McIntyre J., writing for the Court in *Yebes*, held that such a standard of review "would render review on appeal [on questions of fact] almost

impossible."[189] In fact, he suggests that such an interpretation would be utterly at odds with the purpose of section 613(1)(a)(i):

> As a general proposition, the verdict at trial will stand where there is evidence before the jury going in proof of all elements of the offence and where the trial judge has properly charged the jury on all matters of law which arise in the case and has made such references to the evidence as may be necessary to facilitate the application of the law to the facts. However, s. 613(1)(a)(i) of the *Criminal Code* provides an additional basis for the challenging of the verdict at trial. A Court of Appeal may allow an appeal against a conviction where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.[190]

He further directed that the test was, as Pigeon J. had stated in *Corbett*, "whether the verdict is one that a properly instructed jury, acting judicially,[191] could reasonably have rendered."[192] The Court specifically held that an appellate court's role, when reviewing a conviction, "goes beyond merely finding that there is evidence to support a conviction."[193] McIntyre J. states:

> While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence.[194]

Yet, as does the majority judgment in *Corbett*, *Yebes* begs the question: what constitutes a deficiency in the evidence such that an appellate court is entitled to interfere with a conviction even where there is some evidence going to all elements of the offence? *This* question is not answered. Strikingly, however, the terms "unsafe" and "unsatisfactory" *are never employed.* From this, and subsequent cases decided by the Supreme Court, one can conclude that, before an appellate court can interfere with a conviction, it must establish a specific *legal* error on the part of the trial judge. In *R.* v. *S. (P.L.)*,[195] Sopinka J., writing for the majority of the Supreme Court, enunciated the test for appellate review in the following terms:

> In an appeal founded on s. 686(1)(a)(i) the court is engaged in a review of the facts. The role of the Court of Appeal is to determine whether on the fact that were before the trier of fact a jury properly instructed and acting reasonably could convict... The Court of Appeal may disagree with the verdict but *provided that the accused has had a trial in which the legal rules have been observed, no complaint can be upheld if there is, on the evidence, a reasonable basis for the verdict.* [emphasis added][196]

Given the Supreme Court's decisions in *Vetrovec* and other such cases concerning the need (or lack thereof) for a specific direction, to the jury, concerning the corroboration of witnesses traditionally viewed as suspect, it seems clear that the Court is intent upon the jury hearing virtually all kinds of evidence and deciding, for itself, the weight to be assigned to that evidence. Therefore, it would seem extremely difficult to establish that a trial judge had erred in providing evidence to the jury, simply for the reason that the evidence in question *prima facie* lacks reliability. This being the case, the standard of appellate deference in Canada, on questions of fact in criminal cases, must be seen as being extremely high. Though the Court, in both *Corbett* and *Yebes*, suggests that the test goes beyond whether there is no evidence on all elements of the offence in question, it is difficult to see how else its rulings may be interpreted given the Court's implicit holding that no type of evidence is inherently deficient.

After Yebes

Since *Yebes*, a number of appellate courts have, on occasion, expressed the view that their jurisdiction to interfere with convictions has been narrowed to the point where they cannot intercede even where the conviction in question is based on evidence that is inherently deficient *qua* unreliable. In *R.* v. *P. (I.)*,[197] Cote J.A., of the Alberta Court of Appeal, concluded his concurring judgment as follows:

> This whole case leaves me with an uneasy feeling. A number of aspects of it appear to fall outside the scope of review of a Canadian appellate court, but not very far outside.

> Present Canadian law instructs me that we must dismiss this appeal, and for that reason I concur in doing so.[198]

In *R.* v. *H. (E.F.)*,[199] a case involving repressed memory,[200] the Ontario Court of Appeal suggested grave doubts as to the propriety of the conviction but concluded that "in view of the constraints which inform our powers of review, we can see no basis for interfering."[201] In both *R.* v. *Irani*[202] and *R.* v. *Guyatt*,[203] the British Columbia Court of Appeal held that the broader "safeness" standard of appellate review had been foreclosed by *Corbett* and *Yebes*.[204]

Rejecting Yebes?

Since *Yebes* was decided in 1987, some Courts of Appeal – and possibly the Supreme Court – have to some extent resuscitated the "safeness" standard of review. In *R.* v. *Malcolm*,[205] Finlayson J.A., writing for the Ontario Court of Appeal, criticized *Corbett* and *Yebes* as describing appellate review in negative terms only, that is in terms of when appellate review should *not* be exercised as opposed to when it should. Finlayson J.A. pointed out what has been noted above, that the question of when evidence displays a deficiency, that may give rise to appellate jurisdiction to overturn a conviction, has not been made clear by the Supreme Court. He found that the test to be applied was in essence no different from that to be applied by English appellate courts:

> [I]n the final analysis, the reaction of the court as to when an injustice has been done is a subjective one. While the language of the English Court of Appeal's empowering statute is different than our Code, the court asks itself what amounts to the same question: Is the verdict safe or unsatisfactory? I think that as appellate judges we will be expected to ask ourselves a similar question notwithstanding the absence of reversible error on the part of the trial judge.[206]

Thus, for Finlayson J.A., there is a deficiency in the evidence when the subjective experience of appellate judges says that given evidence, upon which an inference of guilt

rests, is inherently unreliable. It is unclear how Finlayson J.A. can reconcile his view with those Supreme Court cases that suggest that *no* evidence is *inherently* unreliable. Nonetheless, his words may have been prescient. In *R.* v. *Burke*,[207] the Supreme Court unanimously held that an appellate court has a duty to quash a conviction under section 686(1)(a)(i) where that court "concludes that the conviction rests on shaky ground and that it would be unsafe to maintain it."[208] In 1998, Mr. Justice Kaufman released his *Report of The Commission on Proceedings Involving Guy Paul Morin*.[209] Among the many recommendations of the *Kaufman Report* was the lowering of appellate deference on questions of fact in criminal cases.[210] It includes these comments:

> If the record produces a lurking doubt or a sense of disquiet about the verdict of guilty, should an appellate court not be empowered to act upon that sense *after fully articulating those aspects of the record that have produced that doubt*? No doubt, many appellate judges who sense a potential injustice do this – sometimes indirectly – through their determination of whether there was legal error at trial. With respect, a disquieting conviction may compel an appeal to be allowed on the most esoteric misdirection relating to a point of law that only legal scholars might appreciate. It is well arguable that a slightly broadened scope for appellate intervention permits the Court to do directly what some judges now do directly. [emphasis added][211]

The most recent development took place in October 1999, when the Supreme Court heard oral arguments in the joined cases of *R.* v. *Biniaris; Molodowic; G. (A.)*.[212] The substantive issue in *G. (A.)* is the question of what is the appropriate scope and standard of appellate review afforded under section 686(1)(a)(i). The Court invited submissions by intervenors across Canada, explicitly suggesting that it was re-considering its decision in *Yebes*.

Chapter III –
Justifying Narrow Appellate Review Of Questions of Fact

Introduction

Given the judicial scrutiny currently being paid to the standard of review of convictions in Canada, it is appropriate to anticipate and answer the objections and concerns that would ambush attempts to broaden the standard. This Chapter concerns itself with responding to the more common justifications of narrow standards of appellate review of convictions. The most common and devastating arguments, against a broader standard of review, are: (a) the finality principle, as a condition for the Rule of Law, requires a relatively low level of scrutiny, on the part of appellate courts, as concerns trial fact-findings; (b) the central role of demeanour findings, that are not reviewable on the record, makes broader appellate review of fact-findings impossible; and (c) it is inappropriate for appellate courts to second-guess trial courts on questions of fact, insofar as appellate courts are no more likely to divine the truth than are trial courts. It is submitted that all such attempts at justification lack the persuasive or moral force required for such attempts to be successful.

III.1 The Finality Principle and Appellate Review

The finality principle, broadly, represents the view that criminal proceedings, like all other judicial or quasi-judicial proceedings, must at some point be deemed concluded. By "conclusion" is meant not only that a verdict has been rendered but that the verdict is virtually unassailable, that there is virtually no opportunity for it to be reversed or

otherwise varied in any meaningful way. The finality principle ensures that issues are not perpetually tried and re-tried. In criminal cases particularly, however, the finality principle has the obvious potential to create, or at least facilitate, great miscarriages of justice, as those who are wrongfully convicted may be accorded no avenues of redress. Nor is it altogether clear how, in criminal matters, where the application of the finality principle may result in a catastrophic loss of liberty, this principle can be justified. In *R.* v. *Brown*,[213] L'Heureux-Dube J., dissenting on other grounds, recites some of these justifications:

> [T]he general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation in criminal matters. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted.[214]

These comments were issued in the course of deciding whether a *Charter* argument, not raised at trial, could be raised on appeal; it therefore concerns questions of law as opposed to questions of fact. Nonetheless, some general ideas can be inferred. L'Heureux-Dube J. implies that the main goal of the finality principle is to maintain the reputation of the administration of justice. This chief concern has three prongs:

(a) maintaining respect for the legal community as an informed and competent body;

(b) maintaining the image of the administration of justice as a responsible, socially conscious, and practical institution; and

(c) maintaining the legitimacy of the administration of justice by fostering a sense of societal participation;

Respect for the Legal Community

L'Heureux-Dube J. comments that counsel should be disallowed from making fresh legal arguments on appeal because of the sense of uncertainty that would pervade the administration of justice, from the vantage point of other counsel. She is apparently concerned, then, that the raising of new issues on appeal would undermine the ability of counsel to instruct or inform accused citizens, witnesses, and complainants as to (a) the success or failure of the action in question; (b) the likelihood that they will be required to testify (again) in the future; and therefore (c) whether they should respectively retain counsel of their own, keep funds available for the retaining of such counsel, keep available large blocks of time in the event that further testimony is required, continue to try to remember facts concerning the case in question, etc. One could extend this argument, such that its impact goes beyond the mere inconvenience of the bar and those involved in criminal proceedings. The bar must be able to accurately inform those involved in criminal proceedings, if it is to foster the support of the public. Such support is required in order to maintain the political will to have an independent legal community that, in turn, is the condition precedent for the Rule of Law.[215] A community of lawyers perceived as incompetent or unable to make educated judgments concerning the path of a given case – let alone an area of law generally – may be viewed as a community in need of State regulation, that is, one subject to legislative rather than professional standards.

Once annexed by the political establishment, the argument concludes, the independence of the bar – from which Canada's judiciary is drawn – will be compromised and, with it, the Rule of Law.

The Administration of Justice as Socially Responsive

A linked consideration is cost. Just as the independence of the bar may be compromised by the public perception that citizens are being grossly inconvenienced by inadequate legal advice, so may it be undermined by the public perception that society is footing an unreasonably high bill per case. As La Forest J. states, in *Schwartz* v. *Canada*:[216]

> Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact... This explains why the rule applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge.[217]

The common thread in the two complaints is the legal community's inability to satisfy the larger societal interests that an independent bar is supposed to service. While the Rule of Law demands an independent bar, one must be mindful that the Rule of Law is not an end in itself. Its purpose is to constrain the use of power and, in so doing, guarantee citizens a measure of control over their lives. If the legal community is functioning in such a way that it regularly over-charges and inconveniences the citizen, it may be convincingly argued that the policy reasons for the Rule of Law are not being honored and that the legal community has become the very source of power which the Rule of Law is supposed to constrain. After all, while one may deride the seriousness of such inconveniences, they represent the very sort of State intrusions typical of tyrannies.[218]

The Administration of Justice as Democratic

The idea of social responsiveness is enmeshed in a wider commitment to democratic ideals, the very ideals embodied in the jury system. The jury system, it is implicitly argued, lends legitimacy to criminal proceedings by allowing community participation in those proceedings.[219] The community could only be said to participate in criminal proceedings where its verdict is, in some sense, the final word on the matter. Therefore, when an appellate court interferes with a jury verdict, the community's sense of participation is eroded and, with it, the community's sense that criminal proceedings are fairly decided. This sense of ineffectuality is exacerbated when an appellate court not only overturns a jury verdict, but does so on the basis of a fresh legal or factual argument that the jury was never given an opportunity to hear in the first place. The jury, in such a case, is more or less told that the proceeding over which it presided was not genuine, that its participation was illusory *ab initio*. Not only, then, has the larger community *not* checked the use of power by the judiciary and the legal community; it has, moreover, been used by the legal community to generate an elaborate illusion of democracy. The tyrant has not only undermined citizens' control over the political environment; it has rejected citizens' autonomy to the point where the citizenry is, against its will, implicated as a mechanism of its own servitude; the citizen becomes a means through which the tyrant exerts its unchecked power.

The Credibility of Trial Judges

It has been expressed that wide powers of appellate review must erode confidence in the administration of justice also because of the impression, created by the reversal of a verdict, that appellate courts are simply better triers of fact than are courts of first

instance. How can trial courts garner respect from the public if their fact-findings are constantly overturned? The public may, under such circumstances, arrive at the conclusion that trial courts are either incompetent (in that *real* justice can be had only at the appellate level) or merely ineffectual (because, irrespective of the merits of a given fact-finding, it will be subject to reversal at the appellate stage). Professor Wright has commented:

> [I]ncreased review is likely to lead to quite tangible public dissatisfaction. Every time a trial judge is reversed, every time the belief is reiterated that appellate courts are better qualified than trial judges to decide what justice requires, the confidence of litigants and the public in the trial courts will be further impaired. Under any feasible or conceivable system, our trial courts must always have the last word in the great bulk of cases. I doubt there will be much satisfaction with the judgments of trial courts among a public which is educated to believe that only appellate judges are trustworthy ministers of justice.[220]

Must the Finality Principle Entail Wide Appellate Deference on Questions of Fact?

As L'Heureux-Dube J. suggests in *Brown*, the finality principle stems from the most fundamental liberal democratic values: (a) the liberty of the subject, which contemplates the right of the citizen to be free from unnecessary State interference and; (b) the notion that the individual is not to be used as a means to furthering a State institution only concerned with its own subsistence. There is a sense, then, in which appellate review of convictions could be construed as an assault upon the values undergirding liberal culture. This seems, at the same time, a highly counter-intuitive inference: if the purpose of a liberal democracy is to ensure that the dignity and worth of the individual is respected, it *surely* cannot be the case that a safeguard against the unjust denial of liberty amounts to an attack upon liberal values. To draw such a conclusion would effectively mean taking the position that the *hypothetical* injury, sustained by citizens through the erosion of public respect for the bar and the administration of justice,

somehow outweighed the *actual* injury sustained by accused persons wrongfully convicted. Furthermore, such a conclusion also depends upon the proposition that miscarriages of justice do not themselves undermine public support for the administration of justice. In short, the argument relies upon the tenuous assertion that institutions of law – particularly in matters of criminal adjudication – do not exist for the very reason of preventing unjust deprivations of liberty.

It seems clear that the finality principle cannot justify an utter absence of appellate review of convictions. Nor would it seem that the principle can even justify a high standard of appellate deference inasmuch as the finality principle will always run against the argumentary wall that a real person's liberty interests must always trump those of a hypothetical party. This begs the question, though: must the finality principle make such a justification?

Upon Whom Lies the Persuasive Burden? A Brief Note on Method

This is an important question. At stake is the respective efficacy of the arguments underlying the finality principle and the principle that only the guilty should be convicted (to the extent that these principles conflict). The question, re-phrased, looks like this: is it the burden of the finality principle to justify a limitation on the principle that only the guilty should be convicted, or is it the latter principle's burden to justify a limitation on the former? If neither principle has logical primacy in a liberal democracy, then neither principle can efficaciously attack the other; one ends up with the philosophical equivalent of a "push." If, on the other hand, one principle is logically prior to the other, then it falls to that other to demonstrate why there should be some limitation on the primary principle. The object of this exercise is to demonstrate whether a liberal democratic state

demands, for its own internal coherence, certain standards of appellate review. If, therefore, one principle is logically prior to the other, that other can only persuasively argue a limitation on the prior principle by showing that, absent some limitation, the principle lacks internal coherence. It would be tactically required to show that an unrestricted view of the primary principle would lead one down a "slippery slope" to some end not contemplated by a liberal democratic state, an end undesirable within that context.

The Principle that Only the Guilty Should be Convicted

The principle, that an innocent person should never suffer a conviction, has been a fundamental tenet of criminal law for more than five hundred years. In 1470, Sir John Fortescue, then Chief Justice of the King's Bench, opined that he "should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly."[221] Blackstone, in his *Commentaries*, re-affirmed this basic rule: "It is better that ten guilty persons escape than one innocent suffer."[222] Yet what is "better" may nonetheless be unfeasible. Juries and, indeed, appellate courts, will make mistakes and thereby convict innocent persons. Is the inevitability of such mistakes fatal – or at least debilitating - to the principle that criminal procedure ought to be geared toward the prevention of convictions of the innocent? The question has been implicitly posed in a number of venues. In *Van der Meer* v. *R.*,[223] Deane J., of the High Court of Australia, issued these comments:

> The complementary direct objectives of the administration of criminal law are the conviction and punishment of the guilty and the acquittal of the innocent. The frailty of all human institutions precludes the complete achievement of both. That being so, there is an inevitable tension between them. In the context of such tension, the entrenched and guiding thesis of the criminal law… is that the second objective is incomparably more

> important than the first; that the searing injustice and consequential social injury which is involved when the law turns upon itself and convicts an innocent person far outweigh the failure of the justice and the consequential social injury involved when the processes of the law proclaim the innocence of a guilty man.[224]

Thus, on Deane J.'s view, it is the "frailty of human institutions" that is the *raison d'etre* of the principle in the first place; that is, one would not even speak of having to choose between allowing guilty men to escape and convicting the innocent, unless human frailty made it inevitable that mistakes would be made. Judge Learned Hand seems to take a different view. While acknowledging the centrality of this principle in criminal law, Judge Learned Hand, in *U.S.* v. *Garsson*,[225] relies upon the "frailty of all human institutions" not as a justification for greater appellate review, but as a *foreclosure* of effective review:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. *No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.* [emphasis added][226]

Judge Learned Hand serenely adopts the position that, inasmuch as mistakes are inevitable within the criminal justice system, there is no point in worrying about them. Instead, he suggests, the criminal justice system should focus on disposing of cases in a manner fair to the accused. If the accused is wrongfully convicted, then a tragedy has occurred but it is one contemplated by the system, insofar as the system has, built into it, an understanding that there always lurks the possibility that an accused will be wrongfully convicted. Rather than fight this possibility (which will always be a

possibility because of human frailty), the system must learn to live with it. Since the ghost of the innocent man convicted cannot be defeated, the system must enlist his help in ensuring that fair procedures are always employed. At the same time, since the system is not worried about wiping away the possibility of wrongful convictions, the system should, instead, direct its attention to problems that it *can* resolve, namely, obstructions and delays to the system. Judge Learned Hand takes the notion of human frailty and generates, from it, the finality principle. The principle that only the guilty should be convicted is logically prior, in Hand's view, to the finality principle. However, Hand argues, to suggest that the principle mandates a limitless power of appellate review would result in a paralysis of the criminal justice system; it would effectively strip the State of its role as a law-enforcing body for want of *perfect* enforcement of the law. The principle that only the guilty should be convicted has, built into it, its own limitation. What are the precise boundaries of the principle is unclear.

One might retort that Hand's reading of the principle is utterly incompatible with the precepts of a liberal state, that he has made respect for the individual contingent upon the convenience of the community; that such a privileging of the community over the needs of the individual is so fundamentally anathemic to liberal culture that it strikes at its very roots. Such an absolutist approach to individual dignity is adopted by the Supreme Court of Canada in *R.* v. *Seaboyer*:[227]

> The precept that the innocent must not be convicted is basic to our concept of justice. One has only to think of the public revulsion felt at the improper conviction of Donald Marshall in this country or the Birmingham Six in the United Kingdom to appreciate how deeply held is this tenet of justice... The interest is both individual, in that it affects the accused, and societal, for no just society can tolerate the conviction and punishment of the innocent.[228]

Hand, in turn, might respond that there is nothing contingent about his view's respect for human dignity; it is *inevitable* that innocent people will be convicted. The liberal state exists not to preclude the possibility of all injustice to all persons at all times. It exists to make possible *just* actions, to preclude the possibility of State wantonness in its dealings with individuals. Hence the centrality of the Rule of Law in liberal culture.[229] That an individual is wrongfully convicted does not signify, by itself, disregard for the individual's liberty interests; it signifies only that the State itself is located in an imperfect world. In an imperfect world, innocent persons may be wrongly imprisoned without moral blameworthiness necessarily being assigned to the State and its agents. As long as the Rule of Law is obeyed in the conviction of an individual, the State has fulfilled its commitment to that individual and to the community in general. As Sopinka J. noted, in *R.* v. *S. (P.L.)*,[230] "provided that the accused has had a trial in which the legal rules have been observed, no complaint can be upheld if there is, on the evidence, a reasonable basis for the verdict."[231]

As Sopinka J.'s statement suggests, however, the finality principle presumes that the Rule of Law has been obeyed; if it has not, what recourse has the innocent party? Surely the finality principle, embodying a respect for the Rule of Law, could not be said to foreclose appellate review of cases where there is an error of law or where fact findings are of such an egregious character that they reflect a wanton disregard for such central principles as the presumption of innocence and the burden of proof.[232] Intuitively, it seems that the Rule of Law must provide for appellate review in these cases; if the Rule of Law is the foundation for the finality principle then the finality principle must operate from the starting point that appellate review is justified in certain cases. The finality

principle cannot establish any *a priori* limitation upon the principle, that only the innocent should be convicted, that would remove the latter's capacity to justify sweeping appellate review of convictions. The finality principle *does*, however, establish a *presumption* that fact findings made at trial are correct unless proven otherwise by the appellant; if it were otherwise, the State would have no power to enforce the law.

An Administrative Nightmare?

A central concern of the finality principle is, of course, the smooth operation of the administration of justice. There is a general worry, eloquently expressed by Professor Wright, that wider powers of appellate review must ultimately translate into an administrative nightmare, as routine criminal cases are repeatedly heard and re-heard, and appellate courts are asked to overturn thousands of cases properly (or, at least, not improperly) decided by juries and trial judges:

> We may be sure that the broadened scope of appellate review we have seen will mean an increase in the number of appeals. Is this desirable? We need not worry too much that an increase in appeals will mean overwork for appellate judges; they, after all, have invited the increase. But we should worry about the consequences of more numerous appeals for the litigants and the public. Appeals are always expensive and time-consuming. When they are successful, and lead to a new trial, they add to the burden on already-crowded trial courts... It is literally marvelous that, at a time when the entire profession is seeking ways to minimize congestion and delay in the courts, we should set on a course which inevitably must increase congestion and delay.[233]

In fact, there is no empirical support for the claim that broader powers of review, of convictions, inexorably lead to a flood of new appeals that "clog" the trial courts with matters already adjudicated. In England, where powers of appellate review of convictions are vastly greater than in Canada, it can hardly be said that the principle of finality has been undone by such a broad jurisdiction. The *Report of the Royal Commission of Criminal Justice*, examining the statistical data regarding the number of

verdicts that have been quashed on the "lurking doubt" standards, came to the following conclusions:

> Research done by Kate Malleson for JUSTICE found only six cases in the period between 1968 and 1989 in which the test had been applied. In Malleson's 1989 sample of 114 appeals there was only one such case. More recently, the test has been applied more often. In Malleson's 1990 sample of the first 102 successful appeals heard in the year, there were six successful appeals in which the court held that there was a lurking doubt. In her 1992 sample of the first 102 successful appeals in the year there were 14 cases in which the conviction was quashed because the court considered that the jury had reached the wrong conclusion although there was no fresh evidence and no criticism of the trial process. In nine of these the court said that the evidence was too weak or flawed to justify a conviction; in the other five cases the court referred to having a "lurking doubt."[234]

Admittedly, this statement was issued prior to the 1995 U.K. amendments. Nonetheless, it demonstrates that wider powers of appellate review do not necessarily lead to chaos in the trial courts. It is to be hoped that the Crown prosecutor's office takes its role, as a public servant, seriously. If the Crown respects its office, it is to be expected that there will be few cases brought to trial involving suspect evidence. There need be no administrative difficulties attached to wider powers of appellate review of convictions.

III.2 Should Demeanour be a Bar to Appellate Review?

It is said that the main advantage held by a trial fact-finder, over an appellate court, is the former's ability to see the witnesses as they testify. This allows the trier of fact to better evaluate the demeanour of those witnesses and, in turn, gives the trier of fact a marked advantage, over an appellate court, as regards how evidentiary conflicts ought to be resolved. A witness' demeanour is not recorded on a trial transcript, and so an appellate court is disadvantaged to the extent that it cannot say that the weight, accorded to a witness' testimony by the trial fact-finder, was wrong.[235] In turn, an

appellate court cannot convincingly claim that a trial fact-finder erred in believing one witness over another; an entire case may turn on the question of demeanour. Thus, an appellate court's inability to review findings of demeanour spirals into a general inability to review *any* aspect of a conviction. Mr. Justice Kerans has commented upon the link between demeanour and appellate deference on questions of fact:

> Some courts support rejection of the correctness standard for findings of fact on the ground that the first judge has a special advantage because she sees and hears the witnesses. As Lord Shaw said, that advantage might come 'in even the turn of the eyelid.'[236] This view has existed since the mid 19th century.[237] Lord Haldane was blunt:
>
> > ...to reverse the finding of the judge who tried the case and *saw* the appellant in the witness-box was...a rash proceeding on the part of the Court of Appeal [my italics].[238]

Lord Reid echoed these sentiments in *Benmax* v. *Austin Motor Co. Ltd.*:[239]

> [I]t is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that... Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course the weight of the other evidence may be such as to show that the judge must have formed a wrong impression but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such consideration.[240]

The absence of a useful record, in cases that turn upon credibility and reliability, distinguishes the initial trier of fact as the proper trier of fact.[241] Where it is more difficult for one to clearly discern the facts of a case, the appellate court's duty, to defer to the ruling of the initial trier of fact, is generally considered greater.[242] Hoffman L.J., discussing *Benmax*, states:

> The judge [at first instance] is deciding a question of mixed fact and law in that he is applying the standard laid down by the courts (conduct appropriate to a person fit to be a director) to the facts of the case. It is in principle no different from the decision as to whether someone has been negligent or whether a patented invention was obvious... On the other hand, the standards applied by the law in different contexts vary a great deal in precision and generally speaking, the vaguer the standard and the greater the number of

> factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with a trial judge's decision.[243]

Just as the appellate 'non-interference' rule is justified in English and Australian case law on the basis of the initial trier of fact's superior point of view, so it is in Canada. In *R.* v. *Francois*,[244] McLachlin J. (as she then was) explains why an appellate court should be slow to overturn the findings of fact of a jury:

> In considering the reasonableness of the jury's verdict, the Court of Appeal must also keep in mind the fact that the jury may reasonably and lawfully deal with the inconsistencies and motive to concoct, in a variety of ways. The jury may reject the witness' evidence in its entirety. Or the jury may accept the witness' explanations for the apparent inconsistencies and the witness' denial that her testimony was provoked by improper pressures or from improper motives. Finally, the jury may accept some of the witness' evidence while rejecting other parts of it... we cannot infer from the mere presence of contradictory details or motives to concoct that the jury's verdict is unreasonable...[245]

In *RJR-MacDonald* v. *Canada*,[246] the majority of the Court stated:

> The appellate 'non-interference' rule reflects the traditional recognition that a trial judge is better placed than an appellate court to assess and weigh so-called 'adjudicative' facts or...'who did what, where, when and how and with what motive and intent.'[247]

As in England and Australia, appellate deference is particularly wide where the initial finding of fact is grounded upon an assessment of the credibility of a witness[248] or where the appellate court is otherwise hampered in its ability to conclusively distinguish the facts.[249]

Are Trial Findings of Demeanour Trustworthy?

There is some question as to whether demeanour ought to bar appellate review of convictions. The most damning criticism of the current approach is that it assumes, without justification, that trial fact-finders have the necessary skills to accurately "read" a witness' conduct in order to decide whether that witness' testimony is unreliable. In

Farnya v. *Chorny*,[250] O'Halloran J.A. comments, "The law does not clothe the trial judge with divine insight into the hearts and minds of the witnesses."[251] Baron Devlin has recited these words from Mr. Justice MacKenna:

> I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.[252]

While it is true that a trial judge may be presumed to know the law, there is no reason to presume any knowledge, on the part of a trial fact-finder, of relevant cultural, psychological, or sociological data, apart from that information which may be provided by an expert witness testifying upon the witness stand. Nor is there reason to presume any specific psychological knowledge, on the part of the trier of fact, in relation to the individual witness' unique manner of communicating his/her thoughts to the public. The trier of fact's only exposure to the witness is during the highly stressful examination and cross-examination of that witness. Triers of fact possess no insights, prior to that examination and cross-examination, that might inform their evaluations of a witness' character.[253]

This skepticism gains further force when one considers that Canada – like other Western democracies - is an increasingly culturally-diverse society, one in which different people may impart the truth using different mannerisms, turns of phrase, and the like.[254] It seems patently unreasonable to presume that a trial fact-finder is capable of appreciating the infinity of cultural and psychological data reflected in the subtlest

nuance of an individual witness' testimony, that the fact-finder can determine truth or falsity merely through the "turn of the eye" of that witness. Nor should it be forgotten that, inasmuch as the trial fact-finder effectively acts as its own "expert witness," one that cannot be cross-examined or refuted with the assistance of another witness, a finding of demeanour may disguise a bias.[255]

A further concern stems not from the trier of fact's ability to distinguish a truthful witness from a liar, but rather stems from the distinction itself. Demeanour alone cannot determine the truthfulness of a witness' testimony; demeanour can only provide a glimpse into a person's conscious self. Thus, it *may* reveal whether someone is lying or confused. Often, though, a witness is unreliable not because he is deliberately deceiving the Court or because he is confused (in the sense of being unsure of the facts). Witnesses may believe what they say – indeed, they may be positively certain of it - and yet be mistaken; a trier of fact who conflates believed testimony with truthful testimony risks making an erroneous fact-finding. In *R.* v. *Norman*,[256] Finlayson J.A. states:

> [T]he appearance of honesty and integrity on the part of such witnesses as the complainant gives us little assistance in assessing the reliability of their testimony... [T]hese witnesses believe in what they are saying, whether it is accurate or not.[257]

Furthermore, a witness may lie and nonetheless be capable of concealing any outward signs of deception. As the British Columbia Court of Appeal noted, in *Faryna* v. *Chorny*:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances of the case may point decisively to the conclusion that he is actually telling the truth.

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be guaged solely by the test of whether the personal demeanour of the particular witness carried the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize in that place and in those conditions.[258]

Note that *Faryna* was a civil case; the idea, that demeanour should be used sparingly when making fact findings relating to credibility, must be deemed to apply *a fortiori* in criminal cases.[259] Indeed, there is ample Canadian jurisprudence to suggest that a trier of fact is not *entitled* to base a conviction upon demeanour alone.[260] In *R.* v. *Nadeau*,[261] Lamer J. (as he then was) commented:

> The accused benefits from any reasonable doubt at the outset, not merely if "the two versions are equally consistent with the evidence, are equally valid". Moreover the jury does not have to choose between two versions. It is not because they would not believe the accused that they would then have to agree with Landry's version. The jurors cannot accept his version, or any part of it, unless they are satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, unless a fact has been established beyond a reasonable doubt, to the finding of fact the most favourable to him, provided of course that it is based on evidence in the record and not mere speculation.[262]

Lamer J. makes the case that a trier of fact is never entitled to convict an accused merely because it prefers the testimony of a Crown witness (*i.e.* the complainant) to the testimony of a defence witness (*i.e.* the accused). In law, there is no such thing as a "credibility contest" (though tactically, there is surely such a creature). Such a contest implies that, in order to ground a conviction, the Crown need only prove that the accused's evidence is less believable than the evidence proffered by the State. This cannot be the case because, if true, it would allow for the conviction of the accused on a standard of proof less than that beyond a reasonable doubt. It would allow for a conviction based upon proof on a balance of probabilities. While it is surely a necessary condition of a finding of guilt, that the trier of fact believe the Crown's evidence over that

of the accused, such is not a *sufficient* condition of guilt. If the trier of fact believes the Crown's evidence over that of the accused, it must yet ask itself whether such evidence establishes guilt beyond a reasonable doubt. Demeanour becomes, on this view, just one of several factors to be considered by the trier of fact; it is never determinative. In *R.* v. *W. (D.)*, Cory J., speaking for the majority of the Supreme Court, formulated what has become a standard jury instruction on the question of credibility:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.[263]

Elsewhere, I have said this about Cory J.'s jury instruction:

> [E]ven if the trier of fact disbelieves the accused, it cannot convict the accused simply on that basis. Rather, the trier of fact must first explore the question of whether the Crown has presented a case that convinces it of the accused's guilt beyond a reasonable doubt. Thus, *a finding related to the accused's demeanour can only shield the accused from conviction*; the accused's demeanour cannot itself form the basis of a conviction.[264]

Hence, the notion, that demeanour should be presumed to have such pervasive impact upon a verdict that it ought to constrain appellate power to overturn convictions, loses much of its force. A verdict ultimately hinges not upon demeanour but upon the holistic coherence of a witness' testimony, and upon the consistency of that testimony with other facts.[265] The Supreme Court said as much in *R.* v. *Burke*:[266]

> Despite the "special position" of the trial court in assessing credibility, however, the court of appeal retains the power pursuant to s. 686(1)(a)(i), to reverse the trial court's verdict where the assessment of credibility made at trial is not supported by the evidence... I acknowledge that this is a power which an appellate court will exercise sparingly. This is not to say that an appellate court should shrink from exercising the power, when, after

> carrying out its statutory duty, it concludes that the conviction rests on shaky ground and that it would be unsafe to maintain it. In conferring this power on appellate courts to be applied only in appeals by the accused, it was intended as an additional and salutary safeguard against the conviction of the innocent.[267]

Since findings of demeanour are not testable against the trial transcript, this passage can only be interpreted to mean that appellate courts should consider only whether a witness' evidence is internally consistent, and consistent with other facts. They are not to turn their collective mind to the issue of whether a finding of demeanour would have made any difference to the outcome of the trial.

Re-Thinking the Trial Judge's Duty to Give Reasons

The problem of demeanour may be circumvented not only by relegating it an inferior status as an evidentiary consideration. The problem of demeanour may be lessened, in some cases, by imposing upon a trial judge, sitting without a jury, a duty to give reasons for her findings relating to credibility.[268] Such a requirement would have two facets. The first would require the trial judge to state that she had, indeed, relied upon the witness' demeanour in arriving at a conclusion concerning that witness' credibility; the second would oblige the trial judge to express what aspects of the witness' demeanour caused the trial judge to draw such a conclusion. The first duty would allow an appellate court greater powers of review in those cases not decided on the basis of demeanour findings: the whole of the evidence, upon which the trial judge relied for her verdict, would be apparent on the record, and therefore an appellate court would have no reason to presume some fact "external" to the record that made the verdict. In those cases, where the conviction was substantially based upon demeanour findings, there would yet be an advantage to having the trial judge explain those findings. Defence counsel may, after reviewing the trial judge's reasons, challenge the findings on the basis

of some feature of the witness' background or personality not known by the trial judge. For example, a trial judge who deemed an aboriginal witness to be a not credible witness on the basis of his or her low voice and averted gaze, could have his or her findings later challenged on appeal.[269]

To be sure, the above proposition would demand that the Supreme Court re-consider its decisions in *R.* v. *Burns*[270] and *R.* v. *Barrett*,[271] respectively, to the extent that it would impose upon trial judges the duty to explain (a) how adverse findings of demeanour are reached in a given case; and (b) how such findings are used in a given case, *i.e.* in relation to the Crown's overall burden of proof. Yet, to impose such an obligation would not be as contrary to established Canadian law as it might first appear. In *Burns*, McLachlin J. (as she then was), writing for the Supreme Court, explains why there exists the current rule that trial judges need not give reasons:

> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, *and these conclusions are supported by the evidence*, the verdict should not be overturned *merely because they fail to discuss collateral aspects of the case*. [emphasis added][272]

There are two responses to the above passage. First, fact-findings related to demeanour are *never* – nor *can* they be – supported by the evidence submitted in a given case. No evidence is *ever* given at trial concerning how another witness' testimony ought to be interpreted. If a finding of demeanour is made, it is made solely on the basis of the trial judge's own understanding of human behaviour; the trial judge, in effect, is testifying, before him/herself alone, as an expert cultural, psychological and sociological witness.[273] This "expert testimony" cannot be challenged by either Crown or defence counsel. The

rule against oath-helping, of course, prohibits either counsel from introducing direct evidence bearing on the truth-quotient of another witness' testimony. As stated earlier, there is no reason to presume that a trial judge has some special understanding of any witness' psychological constitution.

Secondly, if one takes the view – commonly held – that fact-findings concerning demeanour and credibility are never simply "collateral" issues, then the above cited passage has no application to those issues. The entire case of the Crown may hinge upon whether a given witness is believed or disbelieved. In many cases, most notably sexual assault cases, credibility and demeanour are often the *only* issues at bar.[274] While, as noted above, the Supreme Court appears to have ruled conclusively against reliance upon demeanour for the purpose of convicting an accused, in practice many cases feature no bedrock facts against which a trier of fact may measure competing stories. In sexual assault cases, the verdict frequently hinges upon which story is more believable: that of the complainant or that of the accused. The Supreme Court has never held, though it has had ample opportunity to do so, that such cases must, by their very nature, be decided in favour of the accused. Therefore, one is left with the conclusion that either (a) credibility contests do not exist and that such cases must be deemed to have a "built-in" reasonable doubt (and that the Supreme Court simply has not made this point explicitly);[275] or (b) credibility contests exist as an *exception* to the rule that an accused cannot be convicted on the basis of demeanour alone. If one adopts the latter position, then it seems clear that, in some cases at least, demeanour is anything but a collateral issue. The Supreme Court has said, on a number of occasions, that a trial judge has a duty to give reasons for

findings in certain situations. This duty was clarified in *R.* v. *R. (D.)*,[276] where the Court held:

> [*Burns*] does not stand for the proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere. *Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions.* The trial judge in this case did not do so. She failed to address the troublesome evidence, and she failed to identify the basis on which she convicted D.R. and H.R. of assault. This is an error of law necessitating a new trial. [emphasis added][277]

Thus, the Court, in *R. (D.)*, has effectively held that a trial judge has a duty to give reasons to explain her findings of credibility in cases which clearly hinge upon credibility. This, of course, does not go so far as to demand that trial judges say, at the outset of their reasons, whether credibility plays a decisive role in cases where its role is not as obvious as in *R. (D.)*. Such a demand, however, would be but a minor step. If that step were undertaken, it would serve to narrow the ambit of cases in which wide appellate deference must be given to trial fact-findings.

Should Trial Proceedings be Recorded?

As was argued earlier, appellate deference is based upon the need to preserve the judgment of the trier of fact where that judgment considers (or may consider) factors, including demeanour, which are inherently difficult to convey through the medium of a *written* decision or *written* records. This begs the question: why should records of trial proceedings take the exclusive form of text? If criminal proceedings were recorded *via* video camera, then the shortcomings of a textual record (*i.e.* the incommunicability of witnesses' demeanour) would be avoided, while losing none of the advantages attached

to a textual record. The demeanour of witnesses would thereby become part of the record and there would be no need for an appellate court to defer to the trier of fact in regard to findings related to demeanour.[278]

In his *Access to Justice Final Report*,[279] Lord Woolf has made a number of recommendations concerning the infusion of information technologies into civil procedure. He suggests that technology has reached a level of ubiquity where it may be seamlessly incorporated into existing Court practice:

> [A]dequate television and video recording facilities are now readily available at most trial centres. The challenge is to integrate this technology with everyday court practice.

Although Lord Woolf refers to the video recording of *expert* testimony, there is no obvious reason why such technology could not be used to record *all* evidence presentation. All witness statements could then be observed by the appellate court; the limitations of text would be circumvented. The appellate court would be in an almost identical position as that of the initial trier of fact.[280]

III.3 Do Appellate Courts Have Any Particular Expertise to Interfere with Trial Fact-Findings?

The mere fact that appellate courts have no substantial or general reason to defer to trial fact-findings does not necessarily mean, by itself, that appellate courts are empowered to interfere with convictions. That is, it may not be enough to show that trial courts are in *as good* a position as appellate courts, when drawing fact-findings. One may need to go further and show that appellate courts are in a *better* position than are

trial courts when arriving at such findings.[281] In *R.* v. *Tat*,[282] Doherty J.A., for the Ontario Court of Appeal, notes:

> The appellate process is not well suited to the assessment of the cogency of evidence led at trial. Appellate courts can claim no particular expertise in the secondhand evaluation of evidence. *Appellate assessment of the factual merits of a case is not likely to be more reliable or accurate than the judgment made at first instance.* Consequently, it is only in the clearest of cases where the result at trial can be said to be unreasonable that appellate intervention is warranted. [emphasis added][283]

On Doherty J.A.'s view, appellate interference is justified only where the trial findings of fact are clearly wrong. This result flows from the proposition that an appellate court is in no better position, for the weighing of evidence, than was the trial court. That being the case, an appellate court is not *prima facie* justified in substituting its opinion for that of the trial fact-finder. This justification emerges only where the fact-findings in question are of such a character that a third party could look at them and say: "*No* court could look at this evidence and arrive at a fact-finding as bad as that reached *here*." A particularly egregious fact-finding lends legitimacy to the appellate court's interference with a conviction, because it generates a presumption that the appellate court *must* be in a better position, to generate fact-findings, than *this* trial court in *this* case. It is trite to say that such a presumption could only be generated in rare cases.

This view finds some support in the Supreme Court's decision in *RJR-MacDonald* v. *Canada*.[284] Here, the Supreme Court held that a trial judge's findings of legislative fact, as opposed to adjudicative fact, are owed no deference by an appellate court:

> [T]he privileged position of the trial judge does not extend to the assessment of 'social' or 'legislative' facts that arise in the law-making process and require the legislature or a court to assess complex social science evidence and to draw general conclusions concerning the effect of legal rules on human behaviour.

> While a trial judge is in a privileged position with respect to adjudicative fact-finding, this is not the case with legislative or social fact-finding, where appellate courts and legislatures are as well placed as trial judges to make findings. Certainly, one does not have to be a trial judge to come to general conclusions about the effect of legal rules on human behaviour.' [285]

Legislative facts are predictions concerning the impact of legislative/judicial decisions, upon day-to-day life. In giving appellate courts jurisdiction to decide legislative facts, two considerations were paramount: (a) the fact that the trial judge has no superior point of view on matters of legislative fact, that could justify the ousting of appellate courts in such cases; and (b) as a matter of policy, trial judges *should not* be accorded the final word on matters of legislative fact:

> [U]nless the appellate courts retain sufficient discretion to review findings of the trial court on matters of legislative or constitutional facts, the appellate courts will be denied their proper role of developing principles in this area of the law to be applied in the multitude of individual cases which come before trial judges.[286]

Note that appellate courts are not only in as good a position as a trial judge in such cases; for policy reasons, it is *preferable* that an appellate court make a legislative finding of fact, even where such a finding interferes with that of the trial judge. The Supreme Court has, then, devised a two-part test for deciding when an appellate court is entitled to interfere with trial fact-findings. How can the second prong of this test be satisfied as a means of justifying a general appellate power to interfere with convictions?

In *R.* v. *Biddle*,[287] Doherty J.A., on behalf of the Ontario Court of Appeal, made these remarks concerning the appellate power to overturn convictions where such convictions are based upon identification evidence:

> Section 686(1)(a)(i) is often invoked in cases which turn on eye-witness identification evidence: Sopinka and Gelowitz, *The Conduct of An Appeal* (1993), at p. 133. This is particularly so where the potential probative force of the identification evidence is undermined by improper identification procedures. Resort to the jurisdiction bestowed on this court by s. 686(1) (a)(i) in identification cases is a response to the well-recognized

> danger inherent in convictions based on eyewitness evidence. *Furthermore, the assessment of the probative force of eyewitness evidence does not often turn on credibility assessments, but rather on considerations of the totality of the circumstances pertinent to that identification. As such, a verdict based on honest but potentially mistaken eyewitness identification is well suited to appellate review under s. 686(1)(a)(i)...* [emphasis added][288]

This reasoning was further explained in *R.* v. *Miaponoose*:[289]

> Since there is no question about the witness's honesty and sincerity in this case, an assessment of the reliability of the identification evidence depends upon a consideration of the basis for the witness's conclusion. While due deference must be given to the findings of the trial judge, *in particular with respect to matters over which he may have had an advantage as trier of fact*, this case clearly falls in the category of cases that are susceptible to a reasoned review by a court of appeal. [emphasis added][290]

The unique power to interfere with convictions is discussed as well in *Tat*:

> While recognizing the limited review permitted under s. 686(1)(a)(i), convictions based on eyewitness identification evidence are particularly well suited to review under that section. *This is so because of the well-recognized potential for injustice in such cases and the suitability of the appellate review process to cases which turn primarily on the reliability of eyewitness evidence and not the credibility of the eyewitness...* [emphasis added][291]

The thrust of these cases, most notably *Tat*, is that an appellate court need only show that it is not *less* capable of rendering fact-findings than the trial court. If this test is satisfied, then a second hurdle must be passed: is the evidence, upon which the conviction was grounded, of such inherently suspect character that appellate review is *prima facie* necessary?

Upon examination, it would seem that the test laid down in *Biddle*, *Miaponoose* and *Tat* is, in many respects, the same as that enunciated in *RJR-MacDonald*: is appellate review necessary? The difficulty with this test is that it forecloses a narrow approach to appellate deference in cases where evidence is deemed to be not *inherently* unreliable.[292] It has already been noted that the Supreme Court has taken a liberal stand with most categories of evidence, preferring to allow the trier of fact to determine what weight such

evidence should be accorded within the context of the particular case in question.[293] Before wider appellate powers, to overturn convictions, can flow from *RJR-MacDonald*, there must first be a legal revolution in the idea of what constitutes inherently unreliable evidence.

Chapter IV –
Making Appellate Review in Canada Holistically Coherent

Introduction

In a sense, this Chapter merely completes the argument begun in Chapter III, that is, that the narrow standard of appellate review of convictions, in Canada, is unjustified on principled grounds. Whereas Chapter III was chiefly concerned with defending the *idea* of broader appellate review from its critics, Chapter IV seeks to make the case that the Canadian judiciary has already accepted a number of principles that, if consistently applied, must logically entail broader appellate review. It will be shown that s. 686(1)(a)(i) is, on a principled level, inconsistent with other standards of appellate review in other sections of the *Criminal Code*, namely, ss. 686(1)(b)(iii) and 686(4). As a starting point, it is presumed that the failure to consistently interpret different provisions of the *Criminal Code*, dealing with appellate review, signifies a lack of principle underlying such interpretations.[294] This notion is derived from the earlier discussion, in Chapter I, of the Rule of Law as requiring the law to be consistently and equally applied.

IV.1 Comparing Section 686(1)(a)(i) With Section 686(1)(b)(iii)

Section 686(1)(b)(iii) ("No Substantial Wrong or Miscarriage of Justice")...

Under section 686(1)(b)(iii), an appellate court is entitled to affirm a conviction notwithstanding its finding that an error of law was committed by the trial judge. It is the Crown's duty to "justify the denial of a new trial."[295] As this wording suggests, there is a

presumption against the propriety of a verdict grounded in legal error. The Crown must prove that "the verdict would necessarily have been the same had such error not occurred."[296] At the same time, s. 686(1)(b)(iii) makes a radical presumption, namely, that it is unnecessary for an accused to have a fair trial, in the strict sense,[297] where the evidence against her is of such an overwhelming character that, absent a fair trial, her guilt is nonetheless obvious. Where the Crown's case is virtually irrefutable, an appellate court may affirm the accused's conviction, even though certain legal principles and safeguards were not honoured at trial. This section is a striking point of comparison with section 686(1)(a)(i) insofar as the same principal issue arises in each; namely, is an appellate court entitled to substitute its opinion for that of the trier of fact? The difference, of course, is that in the context of a s. 686(1)(b)(iii) argument, the question is whether the appellate court may substitute its opinion for that of the trier of fact *in the new trial that must otherwise be ordered*; the trier of fact, with whom the court is concerned, is the *future* trier of fact whose fact-findings are, as yet, unknown.[298] Thus, the stakes are much higher than are those in a s. 686(1)(a)(i) argument, where the appellant has already had the benefit of a fair trial. The application of s. 686(1)(b)(iii) may "effectively deprive accused persons of the right to have their guilt or innocence determined by a properly instructed jury of their peers."[299] This deprivation, in turn, is considered grievous chiefly because an appellate court is unable to weigh the demeanour of witnesses. In *Colpitts* v. *The Queen*,[300] Cartwright J. issued these comments:

> Under our system of law a man on trial for his life is entitled to the verdict of a jury which has been accurately and adequately instructed as to the law. The construction of s. 592(1)(b)(iii) contended for by the Crown in this case would transfer from the jury to the Court of Appeal the question whether the evidence established the guilt of the accused beyond a reasonable doubt. To adapt the words of Lord Herschell in *Makin* v. *Attorney General for New South Wales* [[1894] A.C. 57 at 70.], the judges would in truth be substituted for the jury, the verdict would become theirs and theirs alone, *and would be*

> *arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.* [emphasis added][301]

In *R.* v. *S. (P.L.)*, Sopinka J., for the majority of the Court, reiterated these policy concerns:

> [I]f the Court of Appeal finds an error of law with the result that the accused has not had a trial in which the legal rules have been observed, then the accused is entitled to an acquittal or a new trial in accordance with the law. The latter result will obtain if there is legally admissible evidence on which a conviction could reasonably be based. *The court cannot substitute its opinion for that of the trial court that the evidence proves guilt beyond a reasonable doubt because the accused is entitled to that decision from a trial judge or jury who have all the advantages that have been so often conceded to belong to the trier of fact.* If the Court of Appeal were to make that decision the accused would be deprived of a trial to which he or she is entitled, first, by reason of the abortive initial trial and second by the Court of Appeal. There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction. [emphasis added][302]

What is the Test?

The test, for when an appellate court may affirm a conviction despite the presence of an error of law, was laid down in *Colpitts*. There, Spence J., writing for the Court, enunciated the test as follows:

> I am of the opinion that this Court cannot place itself in the position of a jury and weigh these various pieces of evidence. *If there is any possibility* that twelve reasonable men, properly charged, would have a reasonable doubt as to the guilt of the accused, then this Court should not apply the provisions of s. 592(1)(b)(iii) [now s. 686(1)(b)(iii)] to affirm a conviction. [emphasis added][303]

This test was later reformulated by Robertson J.A., in *R.* v. *Miller and Cockriell*:[304]

> Would the verdicts *have necessarily been* the same? *Could the jury, as reasonable men, have done otherwise than find the appellants guilty?* Is there any possibility that *they* would have had a reasonable doubt as to the guilt of the accused? [emphasis added][305]

This reformulation was implicitly approved, on appeal, by the Supreme Court.[306] In *R.* v. *Wildman*,[307] the Court cited Cartwright J.'s concurring judgment, in *Colpitts*, in holding that the test was whether "the verdict would necessarily have been the same if such error had not occurred."[308] The difference between the two formulations of the test (that of Spence J. and that of Cartwright J., respectively, in *Colpitts*) is striking. Spence J. highlights the objective nature of the test: must *any* jury, viewing the evidence, have concluded that the accused was guilty? Cartwright J., on the other hand, emphasizes the test as a subjective-objective one: must *the jury that first experienced the evidence* have concluded that the accused was guilty, notwithstanding the error in issue? If the test is the former, then an appellate court must weigh the evidence; in order to apply s. 686(1)(b)(iii), it must conclude that any findings relating to credibility, that favoured the accused, could not answer the Crown's case; it must effectively find that there is *no possible* defence. If the test is the latter, then it may rely on the explicit or implicit findings of the trier of fact to guide the appellate court in determining whether the guilty verdict was "inevitable." The Court need only concern itself with the question of whether the error in issue defeated a defence actually before the trial court.[309] This extremely important distinction was lost on Major J. who, in *R.* v. *Bevan*,[310] held that the different formulations of the test do not convey different meanings.[311] Implicitly, however, he adopted Cartwright J.'s test, concluding that "the task of an appellate court is to determine whether there is any reasonable possibility that the verdict *would have been* different had the error at issue not been made."[312]

Section 686(1)(b)(iii) Should Involve a Narrower Standard of Review Than Section 686(1)(a)(i)

Whether or not the s. 686(1)(b)(iii) test is consistent with the s. 686(1)(a)(i) standard, wholly depends upon whether it is the Spence J. or Cartwright J. test that represents the law in Canada. The Spence J. test is the mirror image of the s. 686(1)(a)(i) standard laid down in *Yebes*: is there some evidence supporting a defence against one or more elements of the offence in question? While the tests are formally comparable, however, their respective practical requirements are disparate. If Spence J.'s interpretation of s. 686(1)(b)(iii) represents the law in Canada, then the tactical burden of proof faced by the Crown is far more daunting than that faced by an appellant challenging conviction under s. 686(1)(a)(i), in that the former must establish that *any* jury *could not* have a *reasonable doubt* as to guilt. When *could* a jury *not* have a reasonable doubt? In *any* case where the accused presents evidence in her own defence, or attacks Crown evidence, a trier of fact *could* have a reasonable doubt, because there is always the possibility that the trier of fact will accept the accused's evidence as more credible than that of the Crown. The curative proviso would therefore seem unavailable in the vast majority of cases where credibility is a major issue.

It would be appropriate to demand such disparate standards. The s. 686(1)(b)(iii) test *ought* to be *stricter* than that employed in s. 686(1)(a)(i) analyses. The improper application of the curative proviso could have the effect of denying an accused her constitutional right to be fairly tried by a jury of her peers. There are no comparable stakes in a s. 686(1)(a)(i) analysis. Neither the State nor the community have a constitutional right to banish any citizen from society, notwithstanding the caliber of evidence presented against that citizen by the Crown; there are no *Criminal Code*

provisions allowing the trial judge to direct the jury to *convict*.[313] What is more, the appellant is only applying, in the vast majority of s. 686(1)(a)(i) cases, for a *new trial*; the Crown would have another opportunity to convict the accused according to legal rules and procedural safeguards. If s. 686(1)(b)(iii) is applied, then the case is ended.

If Cartwright J.'s test holds sway, then an appellate court may use the facts tacitly or explicitly accepted by the original trier of fact to infer proof beyond a reasonable doubt of elements of the offence in question, despite (a) the existence of contradictory evidence on the record or (b) credibility concerns. In such a case, the standard of review for s. 686(1)(b)(iii) analyses must be deemed inadequate, in relation to the standard of review contained in s. 686(1)(a)(i). The appellate court is then entitled to take away, from the accused, her constitutionally guaranteed right to a fair trial before a jury of her peers, on the basis of fact-findings reached according to a *prima facie* faulty chain of reasoning. While the original trier of fact has indeed had an opportunity to observe and hear the witnesses at trial, these findings of demeanour may be "coloured" or tainted by the error in question. It seems disingenuous to suppose that findings of demeanour or credibility generally, are not impacted upon by whatever error is deemed to have occurred at trial. Moreover, for reasons already explored, it is submitted that demeanour findings are tenuous, *at best*; when they are "corrupted" by legal error, they ought to be given little or no credence. It is, in theory, justified that an appellate court accrues marked respect for fact-findings in s. 686(1)(a)(i) appeals, because there is no *prima facie* reason to doubt the basis upon which such findings were made. At the s. 686(1)(b)(iii) stage of appeals based on errors of law, there is no strong reason to accrue such respect to the findings of the trier of fact. Respect for the jury system should, in this situation, cash out as a

willingness to *overturn* the original trier of fact's findings. The Cartwright J. test is far too weak to be consistent with the standard of review under s. 686(1)(a)(i).

Section 686(1)(b)(iii) Case Law: Cartwright J.'s Interpretation Wins

In *R.* v. *Haughton*, Sopinka J., writing for the Court, states:

> The application of s. 686(1)(b)(iii) of the *Criminal Code*... requires the court to consider whether a jury properly instructed could, acting reasonably, have come to a different conclusion absent the error. *In applying this test the findings of the jury in the case under appeal may be a factor in determining what the hypothetical reasonable jury would have done, provided those findings are not tainted by the error.*[314]

A number of cases suggest that an appellate court is to narrowly construe the category of cases where a trier of fact's findings are tainted by an error of law. It is, therefore, submitted that Cartwright J.'s formulation of appellate powers under s. 686(1)(b)(iii) now represents the law in Canada. In *Alward and Mooney* v. *The Queen*,[315] the Supreme Court was asked to consider two issues: (1) whether similar fact evidence was admissible[316] and, if not, whether the curative proviso should be applied; and (2) whether the trial judge's misdirection on the defence of drunkenness could be cured by s. 613(1)(b)(iii) (now s. 686(1)(b)(iii)). Spence J., writing for the majority, held that, in this case, the similar fact evidence was indeed admissible. He nonetheless commented upon whether the curative proviso could have been otherwise applied, and found that such evidence would have been "gravely prejudicial" and therefore not curable under s. 613(1)(b)(iii).[317] As concerned the misdirection on the defence of drunkenness,[318] however, Spence J. held that s. 613(1)(b)(iii) *could* be applied, despite the testimony of the accused persons that they were heavily intoxicated at the time of the alleged offence,

as well as the testimony of two other witnesses that the appellants were somewhat intoxicated. Spence J. acknowledged that there was sufficient evidence upon which a jury could conclude that the appellants lacked the capacity to form the requisite intent, but decided that no reasonable jury could arrive at such a conclusion.[319] Though Spence J. employs the objective language of "reasonableness" in his judgment, it is clear that the test mirrors that enunciated by Cartwright J. in *Colpitts*; Spence J. disregards the clear jurisdiction of a trier of fact to acquit the accused on the basis of the drunkenness defence.[320] He states:

> ... I am unable to see how any jury, properly charged, could as reasonable men failed to convict these appellants or specifically could have concluded that there was any reasonable doubt that each of them had the capacity to form the specific intent to rob and assault the late Mr. Willet. It is not necessary to outline that evidence, sufficient to say that it did convince a jury, a fact which cannot be ignored, despite the faults in the charge...[321]

The only conclusion that could be drawn is that, while Spence J. finds some evidence to support the defence of drunkenness, he concurrently finds, *based upon the jury's verdict*, that this evidence is not credible.[322]

In *R.* v. *Jacquard*,[323] Lamer C.J.C., writing for the majority, held that a trial judge's error was of such a benign and insignificant character, that the curative proviso could be applied. Lamer C.J.C.'s reliance, upon the Cartwright J. standard of s. 686(1)(b)(iii) review, is apparent here. The error in question was in instructing the jury that it could infer consciousness of guilt on the part of the accused, charged with two offences, not only in the context of one charge but in both. Lamer C.J.C. emphasized four factors, relating to the trial judge's errant instruction, that "saved" the conviction in issue:

(a) the trial judge carefully instructed the jury that, although it could infer consciousness of guilt, it ought not place a great deal of emphasis on such facts, if found;

(b) the jury was entitled to infer consciousness of guilt in relation to the second of the two charges;

(c) consciousness of guilt represented a minor part of the Crown's overall case against the accused; and

(d) the error in question was the only error.[324]

Thus, Lamer C.J.C. emphasized the isolation and insignificance of the error within the Crown's "case-to-meet." Insofar as neither the Crown nor the trial judge suggested that the case turned on the (non-)inference of consciousness of guilt, a jury, one could presume, would not base its verdict of guilty upon such an inference. Furthermore, there were no other errors that a jury may have viewed in conjunction with an inference of consciousness of guilt, buttressing one error with another thereby multiplying the prejudicial effect of both. Having neatly separated this issue from the Crown's overall case, Lamer C.J.C. inferred that the jury's verdict was based entirely on admissible evidence and inferences; there was no reason to dispute the reasonableness of the jury's findings. The trial is not treated as "abortive" merely because an error in law has occurred.

In *Leaney and Rawlinson* v. *The Queen*,[325] the Supreme Court held that the trial judge, in convicting Rawlinson, had wrongly held certain evidence to be similar fact

evidence. The remaining evidence against Rawlinson consisted of wholly circumstantial evidence connecting him to the crime; this evidence was unrebutted by the defence. McLachlin J. (as she then was), for the majority of the Court, held that no reasonable trier of fact could fail to convict.[326] Dissenting in part, Lamer C.J.C.,[327] suggested that the Crown's circumstantial case *could* lead to a conclusion other than guilt and that, therefore, s. 613(1)(b)(iii) should not be applied. Lamer C.J.C. stated:

> [T]he evidence adduced against Rawlinson does not meet the test of s. 613(1)(b)(iii). It is evidence upon which a verdict of guilty could rest comfortably and stand well beyond the reach of a court of appeal's determination that it was unreasonable and not supported by the evidence. But with respect to the views of the majority, as has often been stated, much more is required under s. 613(1)(b)(iii).[328]

It is of note that Lamer C.J.C. specifically found a fact relating to the Crown's case not found (or at least to which no *direct* allusion is made) by McLachlin J.[329] For this reason, it is acknowledged that there *may* be no disagreement, in principle, between McLachlin J. and Lamer C.J.C., as to the appropriate standard of review under s. 613(1)(b)(iii), but rather only disagreement as to how this standard should be applied to this particular case.[330]

Even disregarding, however, the possible differences of opinion between McLachlin J. and Lamer C.J.C., as to the facts of this particular case, it could be said that different standards of review are being employed. McLachlin J. must be taken as saying that a jury could not have a reasonable doubt concerning the guilt of the appellant despite the circumstantial quality of the evidence and, perhaps, the available inference that this evidence, ***even if believed***, could lead to a conclusion other than guilt. On what basis does McLachlin J. arrive at such a conclusion, though, given that the error in question concerned similar fact evidence? The enormous impact that improperly admitted similar

fact evidence may have upon the credibility of the accused is, of course, not an issue here because the accused presented no rebuttal evidence. Nonetheless, similar fact evidence may yet encourage the trier of fact to convict an accused simply on the basis that he is a bad *person* rather than a person guilty of the charge in question. The trier of fact could convict the accused absent proof beyond a reasonable doubt as to all elements of the offence. That being the case, it seems unreasonable to infer, from the jury's finding of guilty that the jury *must* have believed the Crown's evidence going to all elements of the offence. It would seem that McLachlin J., in *Leaney*, has disregarded not only Spence J.'s *Colpitts* test but that of Cartwright J. as well. In effect, she weighs the evidence and concludes that no jury could fail to convict, suggesting the higher standard enunciated by Spence J. At the same time she weighs the evidence without regard to the manner in which the original jury's experience of that evidence was affected by the impugned evidence, suggesting a standard *even broader* than that formulated by Cartwright J. in *Colpitts*.[331]

When Will an Appellate Court *Dispute* the Findings of the Original Trier of Fact?

In *R.* v. *Titus*,[332] the trial judge refused to allow defense counsel to cross-examine a Crown witness as to that witness' outstanding indictment. The Supreme Court, in refusing to apply s. 686(1)(b)(iii), made these comments as to the seriousness of this error:

> I think it essential to stress the purpose for which the cross-examination is permitted, namely, in order that the defence may explore to the full all factors which might expose the frailty of the evidence called by the prosecution. That the accused as he stands in the prisoner's box on trial for murder is deemed to be innocent until proven guilty beyond a

> reasonable doubt is one of the fundamental presumptions inherent in the common law and as such the accused is entitled to employ every legitimate means of testing the evidence called by the Crown to negative that presumption and in my opinion this includes the right to explore all circumstances capable of indicating that any of the prosecution witnesses had a motive for favouring the Crown. In my opinion the outstanding indictment preferred against the witness by the same police department that had laid the present charge against Titus constitutes such a circumstance and accordingly I am of opinion that the learned trial judge did indeed err in precluding defence counsel from pursuing this line of questioning.[333]

Here, the Court suggests that, where the error in issue disguises a witness' inherent frailty, as a credible source of evidence, by virtue of being one with a strong motive to lie on behalf of the Crown, such error must be considered substantial. Certain categories of witnesses should be treated as inherently less credible than others and, where the original trier of fact was not permitted to evaluate the totality of circumstances surrounding a witness' testimony, and thereby determine the category into which this witness should be "slotted," it cannot be presumed that the trier of fact would have believed her testimony. Situating this decision within the background of the s. 686(1)(b)(iii) cases, reviewed above, it seems that an appellate court is more likely to deem a jury's findings, as concern credibility, to be unworthy of respect when the error in issue *deprives* the jury of admissible information, rather than presents inadmissible evidence to the jury. This conclusion is buttressed by the Supreme Court's decision in *R.* v. *Hinchey*,[334] where Cory J., writing a concurring judgment, suggests that non-direction, on the use of good character evidence, may render an error in law not "saveable" under s. 686(1)(b)(iii):

> There was a complete failure to instruct the jury with regard to the use of the character evidence which was presented. This testimony was of vital importance to the defence… No matter how tenuous that position might seem to be it remains that the credibility of Hinchey was fundamentally important to his defence. It follows that the failure to refer to this evidence and instruct the jury with regard to use that could be made of it adversely affected the fairness of the trial. Indeed it has been held that the failure of a trial judge to properly instruct the jury with regard to character evidence is a serious misdirection or non-direction of such gravity that it cannot be rectified by the curative provisions of s. 686(1)(b)(iii). See *R.* v. *Tarrant* (1981), 63 C.C.C. (2d) 385 (Ont. C.A.).[335]

While good character evidence cannot directly reinforce the accused's credibility as a witness,[336] it certainly influences the trier of fact's opinion of the accused as a *person* and this may (indeed, will *probably*), as an ancillary matter, colour the trier of fact's "reading" of the accused's testimony. The failure to instruct the jury as to the use it could make of good character evidence may be, broadly, equated with the failure to allow cross-examination of Crown witnesses. In either case, the jury is not provided with the full "flavour" of a given witness' testimony with which it may effectively judge its probative force.[337]

A possible counter-example is *Bevan and Griffith* v. *The Queen*.[338] In *Bevan*, the Crown's two key witnesses, B. and D., both had prior criminal records. D. was serving a term of incarceration, and B. had only recently been arrested. Both approached the police, claiming to have information about the alleged offence. Each claimed to have heard the two accused implicate themselves in the alleged offence. A letter, which contained the substance of the remarks overheard by D., was read aloud at trial and submitted to the jury as an exhibit. At trial, D.'s testimony revealed a number of statements inconsistent with the contents of the letter. The trial judge gave the jury no caution as to the use of the uncorroborated testimony of B. and D.[339] The trial judge also failed to instruct the jury on the use it could make of prior inconsistent statements, or of the letter. The Supreme Court held that all these non-directions were in error, and held that, given the *cumulative* impact of the errors, s. 686(1)(b)(iii) could not be applied.[340] Major J., writing for the majority, did not say whether the trial judge's failure, to issue the *Vetrovec* warning, would have been sufficiently prejudicial, *by itself*, to remove this case from the ambit of s. 686(1)(b)(iii). He only referred to each of the errors as "serious."[341]

Thus, *Bevan* cannot be relied upon to support a claim opposing that made above, that an appellate court will only refuse to exercise s. 686(1)(b)(iii) where inherently frail evidence is disguised, by virtue of the error in issue. No general willingness to recognize the inherent frailty of certain categories of evidence and, therefore, any inherent frailty in certain jury fact findings, can be discerned in *Bevan*.

The significance of such cases as *Titus*, *Hinchey*, and *Underwood*, is the implicit reasoning that, unless the error in issue removes something from the perception of the original trier of fact, the fact-finder should be presumed to know how to use the evidence placed before it. For reasons stated above, it is submitted that this is a dangerous presumption, and one that is inconsistent with the jurisprudence of s. 686(1)(a)(i).

Is Spence J.'s Test Re-Emerging?

For the sake of completeness, it bears mentioning that the Supreme Court has, in a number of cases, resuscitated the Spence J. standard of review in s. 686(1)(b)(iii). The majority decision,[342] written by Lamer C.J.C., in *R.* v. *B. (F.F.)*, runs contrary to the line of authorities cited above. In *B. (F.F.)*, Lamer C.J.C., refusing to apply s. 686(1)(b)(iii), discusses the test to be employed in s. 686(1)(b)(iii) analyses in the following terms:

> I... approach the question of whether this is a case in which the proviso of s. 686(1)(b)(iii) should be applied by asking whether, if the jury had been properly instructed, *the verdict of guilty would necessarily have been the same in the sense that any other verdict would have been unreasonable or not supported by the evidence*. This exercise must be conducted with respect for the function of the jury, whose role it is to determine what evidence of which witnesses they accept, the weight it should be accorded and, in the final analysis, whether there exists a reasonable doubt about the guilt of the accused. [emphasis added]

> ... Depending on what evidence was accepted, there certainly could have been ample evidence upon which a jury properly instructed could convict on the charges upon which this jury convicted the accused. *However, verdicts of acquittal on all counts on the trial record as it stands would, in my respectful view, not be susceptible to be set aside as being unreasonable.*[343]

The emphasized portions of the above passage suggest that the test is the stricter one enunciated by Spence J., in *Colpitts*. Lamer C.J.C. relies upon the words of Sopinka J., cited above, in *R.* v. *S. (P.L.)*:

> ... [I]f the Court of Appeal finds an error of law with the result that the accused has not had a trial in which the legal rules have been observed, then the accused is entitled to an acquittal or a new trial in accordance with the law. The latter result will obtain if there is legally admissible evidence on which a conviction could reasonably be based. The court cannot substitute its opinion for that of the trial court that the evidence proves guilt beyond a reasonable doubt because the accused is entitled to that decision from a trial judge or jury who have all the advantages that have been so often conceded to belong to the trier of fact. *If the Court of Appeal were to make that decision the accused would be deprived of a trial to which he or she is entitled, first, by reason of the abortive initial trial and second by the Court of Appeal.* There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction. [emphasis added][344]

The words of particular interest, here, are "*abortive* initial trial." One may interpret such words to mean that the original trier of fact's findings are of no significance within the s. 686(1)(b)(iii) analysis. This, in turn, implies that an appellate court is to exercise its powers under s. 686(1)(b)(iii) only where the Crown's case is *irrefutable* on all elements of the offence. It is submitted that, should these cases be applied consistently, then s. 686(1)(b)(iii) will be principly compatible with the jurisprudence of s. 686(1)(a)(i).

IV.2 Section 686(4) (Appeals from Acquittal)...

In *Vezeau* v. *The Queen*,[345] the majority of the Supreme Court held that an appellate court may overturn an acquittal where the Crown establishes an error of law, and satisfies the Court that "the verdict would not necessarily have been the same if the trial Judge had properly directed the jury."[346] In dissent, Dickson J. (as he then was) stated a stricter test:

> [F]or a new trial to be ordered the Crown must satisfy the Court with a substantial degree of certainty that the jury would necessarily have convicted the accused in the absence of the [error in issue].[347]

In *R.* v. *MacKenzie*,[348] La Forest J., *in obiter*, suggested that Dickson J.'s test is substantially more onerous, for the Crown, than is that of the majority:

> It is unclear from the judgments in *Vezeau* whether anything turned on these different formulations, and I would not wish to make too much of the point. However, Dickson J.'s formulation would obviously present a more difficult task for the Crown – it would have to show that the jury's verdict *would* have been different, rather than establishing only that it *may not* have been the same, which is the majority's formula.[349]

Ultimately, as La Forest J. notes in *MacKenzie*,[350] it was the majority's test, in *Vezeau*, that was re-affirmed in *R.* v. *Morin*.[351] In regard to the test, Sopinka J. commented:

> I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it.[352] Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do.[353]

The jurisdiction to allow an appeal against an acquittal is properly greater than that to affirm a conviction in the face of an error of law. As in s. 686(1)(b)(iii) cases, where the issue is whether to allow an appeal against acquittal, respect for the jury process demands that appellate courts be skeptical of fact-findings rendered in an environment "tainted" by legal error. The standard to be employed under s. 686(4) should be more relaxed than

that under s. 686(1)(b)(iii) insofar as there are no *prima facie* constitutional issues at stake; an accused is entitled to a fair trial, and not a trial that most ideally serves her interests. In *R.* v. *Finta*,[354] the Ontario Court of Appeal compared the standards to be respectively used in these two sections:

> On an accused's appeal from conviction, the conviction may be sustained, in the face of a wrong decision on a question of law, if the appellate court concludes the error did not give rise to a substantial wrong or miscarriage of justice: see s. 686(1)(b)(iii). On a Crown appeal from an acquittal, there is no similar statutory provision controlling the decision whether, in the face of an error on a question of law, an acquittal can be sustained, and the Crown's appeal dismissed. However, it has long been established that a defence appeal from conviction, and a Crown appeal from an acquittal, both bring into play the issue whether the error on a question of law occasioned no substantial wrong or miscarriage of justice...
>
> There is, therefore, a reciprocal parallel between the analysis required on a defence appeal against conviction and a Crown appeal against an acquittal. In both cases if an error on a question of law is found, the appellate court will consider whether the error occasioned no substantial wrong or miscarriage of justice.
>
> The answer to the question whether the error has occasioned no substantial wrong or miscarriage of justice requires the appellate court to consider the effect of the error. In the case of a defence appeal against conviction, if an error on a question of law is found, the appellate court will inquire if the verdict would necessarily have been the same (guilty), had there been no error. In the case of a Crown appeal against acquittal the same question, but in its negative form, is frequently posed. Thus, on a Crown appeal, the issue, as frequently articulated, becomes whether the verdict would not necessarily have been the same, had there been no error. This articulation of the issue is somewhat confusing, in that its plain wording (if applied literally), suggests that the Crown bears a less stringent onus to sustain a conviction on a defence appeal, than it faces when attempting to set aside a verdict of acquittal on a Crown appeal.[355]

The Court concludes that the two tests are the same, in the sense that the question to be resolved is whether the error in question amounts to a "substantial wrong or miscarriage of justice." This is hardly a useful formation of the issue, however, because it seems intuitively obvious that a wrongful *acquittal* can *never*, within the context of the administration of justice, be a miscarriage of justice or a substantial wrong. It is submitted that the State's moral duty, to safeguard the liberty interests of its citizens, must translate into a sterner test, under s. 686(4), than that exercised under s. 686(1)(a)(i).

A citizen should not, *for a second time*, be arrested, and made to undergo the rigours and humiliation of a criminal trial, unless the State is able to show that, barring the error in issue, the original trier of fact would, on a balance of probabilities, have convicted the accused. Sopinka J.'s formulation of the test, in *Morin* cited above, strikes the correct balance in the continuum of appellate powers of review, between what *ought* to be an extremely narrow jurisdictional power to affirm convictions in the face of legal error, and what *ought* to be a comparatively wide jurisdictional power to overturn convictions based on factual error.

Chapter V –
Alternatives to Appellate Review

Introduction: Is Narrow Appellate Review Offset By Other Means of Rectifying or Preventing Miscarriages of Justice?

It could be argued that this paper has not yet adequately contextualized the absence of broad powers of appellate review of convictions. Could one not argue that there are other means of preventing or remedying miscarriages of justice, such that broad appellate review of convictions is unnecessary? It is submitted that there *are* two other procedural safeguards designed for such a purpose: the preliminary hearing and the "mercy" provisions of the *Criminal Code*, under s. 690. It is further submitted, however, that neither of these "safeguards" are satisfactory substitutes, at least as they currently stand, for broad powers of appellate review of convictions. Ultimately, if there is a means of offsetting the danger of wrongful convictions facilitated by narrow appellate review under s. 686(1)(a)(i), it may be in s. 686(1)(a)(iii), which allows an appellate court to interfere with a conviction where there has been a miscarriage of justice. This provision, however, can only facilitate greater appellate review of fact-findings where the fact-finder was a trial judge; jury trials must remain largely unreviewable on questions of fact.

The Preliminary Inquiry and Directed Verdicts

In principle, the preliminary hearing can function as a vetting mechanism for cases that rely upon inherently suspect or unreliable evidence. It may, therefore, act as an added safeguard against miscarriages of justice, preventing triers of fact from wrongly convicting individuals, instead of merely rectifying such matters after-the-fact. In *R.* v. *Skogman*,[356] Estey J. states:

> The purpose of a preliminary hearing is to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process.[357]

While Estey J. notes that the preliminary inquiry has evolved into a forum for discovery, he makes it clear that this function is merely secondary, an additional, unlooked-for benefit that has emerged but is not to be confused with the preliminary inquiry's *raison d'etre*. It is submitted, however, that, as the procedure has been interpreted, the preliminary hearing cannot compensate for narrow appellate review on questions of fact in criminal cases. The standard of deference, owed by a preliminary inquiry judge to the ultimate trier of fact, is *at least* as high as that owed by an appellate court. In *U.S.A.* v. *Sheppard*,[358] Ritchie J., writing for the majority, suggests that the justification for a high level of deference on the part of the inquiry judge is the need to protect the proper trier of fact from encroachments upon his or her authority:

> With the greatest respect I cannot accept the proposition that a trial Judge is *ever* entitled to take a case from the jury and direct an acquittal on the ground that, *in his opinion,* the evidence is "manifestly unreliable". If this were the law it would deprive the members of the jury of their function to act as the sole judges of the truth or falsity of the evidence and would thus, in my opinion, be contrary to the accepted role of the jury in our legal system. [emphasis added][359]

It will become apparent, in the following discussion concerning directed verdicts, that the standard for preliminary inquiries has not changed since *Sheppard*.[360] If there is *any* admissible prosecution evidence going to each of the elements of the offence in question, then the inquiry judge *must* commit the accused to trial.[361] It is conceivable that the standard of deference in preliminary hearings, owed to the trial fact-finder, is *even greater* than that on appeal.[362] That being the case, the trial judge must admonish the jury that they can convict only if they are satisfied beyond a reasonable doubt, but he must leave the verdict with them though he is convinced that no reasonable jury could be

satisfied to that standard![363] Except in those exceedingly rare cases where the Crown cannot produce a *scintilla*[364] of evidence going to all elements of the offence, the preliminary hearing is impotent as a means of preventing miscarriages of justice.[365]

The directed verdict could also, in principle at least, preclude unsophisticated triers of fact from convicting on the basis of unreliable evidence. Moreover, there is reason to believe that it should be more difficult, in principle, for the Crown to satisfy the test of sufficiency in a motion for a directed verdict, than in a preliminary inquiry. The trial court, unlike the preliminary inquiry, is a court of competent jurisdiction for the purpose of excluding evidence that is inadmissible under the *Charter*.[366] Furthermore, the Crown may not "show its full hand" at the preliminary inquiry, opting to show just enough to get past the initial hurdle. The trial judge will see far more of the Crown's case, warts and all, than will the preliminary hearing judge. It seems to make sense that the trial judge should have greater powers to take verdicts away from juries.[367] Unfortunately, the test for a directed verdict is identical to that for preliminary inquiries; that is, unless there is no evidence going to an element of the offence, the trial judge cannot order the jury to return a verdict of acquittal. In *Mezzo*,[368] McIntyre J., writing for the majority of the Supreme Court, commented upon the *Sheppard* test:

> Ritchie J. has stated what has been called the 'classic statement' of the rule that has been the law of Canada since before the *Criminal Code* was adopted. In this, he has adopted as the measure of sufficiency the concept of a *prima facie* case, that is, a case containing evidence on all essential points of a charge which, *if believed by the trier of fact and unanswered*, would warrant a conviction. [emphasis added][369]

For the purposes of satisfying the shared test for directed verdicts and preliminary inquiries, evidence presented by the Crown is presumed to be unassailable, and this presumption cannot be rebutted by looking to the obvious interests or frailties of

witnesses. In *Monteleone*,[370] the Supreme Court again affirmed the test for sufficiency enunciated in *Sheppard*:

> Where there is before the court any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal. It is not the function of the trial judge to weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made. It is not for the trial judge to draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury.[371]

The Court affirmed this test, most recently, in *Charemski*.[372] Bastarache J., writing for the majority, stated:

> In my view, the trial judge should have directed the jury according to the requirement that a finding of guilt could only be made where there was no other rational explanation for the circumstantial evidence but that the defendant committed the crime... Making that finding is essentially a factual matter arising from an evaluation of the evidence. That assessment is properly left to the jury. Judges should not be hasty to encroach on that time-honoured function, particularly where well-established principles articulated in this Court provide clear guidance on the circumstances in which a question may be withheld from the jury.[373]

Plainly, as noted above, neither directed verdicts nor preliminary inquiries have much "vetting" power, given the extremely narrow category of cases in which the Crown could fail to satisfy the test for sufficiency. They are capable of "weeding out" only the worst instances of capricious or incompetent prosecution.

Section 690

The Prerogative of Mercy

Section 690 of the *Canadian Criminal Code* states:

> 690. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,
>
> (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he

thinks proper, if after inquiry he is satisfied in the circumstances a new trial or hearing, as the case may be, should be directed;

(b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under preventive detention, as the case may be; or

(c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish the opinion accordingly.

As the provision itself notes, an application under s. 690 is essentially no more than a request for "mercy." It is a throwback to the days when the King or his representative could exercise the royal prerogative and free a person convicted of any crime despite the fairness of that person's trial. Thus, the powers conferred upon the Minister of Justice are more or less discretionary. Nonetheless, the Minister cannot exercise this power arbitrarily or in an underhanded fashion. As Blackstone observed:

> In the exercise... of those prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution. And yet, if the consequences of that exertion be manifestly to the grievance or dishonor of the kingdom, the parliament will call his advisers to a just and severe account.[374]

Similarly, in Canada, the Supreme Court has held that administrative powers, such as s. 690, must be exercised in accordance with the requirements of "natural justice." In *Operation Dismantle* v. *Canada*.[375] The Supreme Court held that Ministerial exercises of the Crown prerogative are subject to judicial scrutiny for compatibility with s. 7 of the *Charter*. As Dickson C.J.C. states:

> I have no doubt that the executive branch of the Canadian Government is duty bound to act in accordance with the dictates of the *Charter*. Specifically, the Cabinet has a duty to act in a manner consistent with the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[376]

Immediately following *Operation Dismantle*, it was confirmed that the rules of natural

justice as enshrined in s. 7 are applicable to the Minister's discretion under s. 690 of the *Code* and that the discretion is therefore subject to judicial review on that basis.[377] It has not yet been determined what are the s. 7 procedural requirements, and the requirements of natural justice, under the circumstances of a s. 690 application.[378] It seems unlikely that the Minister must hold a formal hearing in full accordance with the requirements of ss. 8-14 of the *Charter*, each time a s. 690 decision is made. The highly "judicialized" nature of a s. 690 decision, however, coupled with the serious extent to which such a decision affects the rights and freedoms of a specified individual, lead one to suspect that, in s. 690 applications, natural justice demands, at the very least, standards of procedural fairness normally applicable to "executive" and "administrative" Ministerial decisions.

The Doctrine of Legitimate Expectation

The principle of "legitimate expectation" applies where (a) a governmental authority expressly promises that its decision will be reached according to a certain process; and (b) its implementation does not interfere with the authorities' duty.[379] In *Bendahme*, Hugessen J.A. adopted the comments of Lord Fraser of Tullybelton in *Attorney General of Hong Kong* v. *Ng Yuen Shiu*:[380]

> [W]hen *a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and implement its promise,* so long as implementation does not interfere with its statutory duty. The principle is often justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct. [emphasis added]
>
> In the opinion of their Lordships, the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the Government of Hong Kong to the Appellant, along with other illegal immigrants from Macau, in the announcement outside the Government House on October 28, that each case would be considered on its merits.[381]

Though dissenting in the result of *Bendahme*, Marceau J.A. agreed with Hugessen J.A. as to the nature of the "legitimate expectation" doctrine:

> This principle of "legitimate expectation"... is based on a very sound notion. No one would dispute that even where there is no indication of bad faith or manifest unreasonableness, there may be cases in which government authority should not be permitted to go back on its word to the detriment of an individual who has relied on this and acted accordingly. One can conceive of a sort of application of common law estoppel in administrative matters, given the representation on the one hand and the reaction of trust and reliance on the other as a means of ensuring fairness.[382]

In *Pulp, Paper and Woodworks of Canada Local 8*, the Minister provided the Appellants with a brochure specifying the procedure by which the Appellants' pesticide would be approved for sale in Canada. This process included a stage where the Minister would consult with certain specialized government departments. The Minister then decided without consultation. The Minister's decision was quashed on review and that decision was affirmed by the Federal Court of Appeal. Desjardins J.A. concluded:

> The Minister became bound by his own rules. The doctrine of legitimate expectations, being an element of procedural fairness, applies fully in this case. The trial judge so decided and I agree with him.[383]

The Supreme Court has recently suggested that there is a substantive aspect to the doctrine of "legitimate expectations." In *Baker* v. *Minister of Citizenship and Immigration*,[384] the Court held that, where a particular claimant has a legitimate expectation that a particular *result* will be reached, the standard of procedural fairness must be elevated. L'Heureux Dube J., writing for the majority, made these comments:

> [I]f a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded... Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to

> procedure, or to backtrack on substantive promises without according significant procedural rights.[385]

Where a claimant has a legitimate expectation that a decisionmaker's stated procedure must result in the success of the claim in question, the decisionmaker has a superordinary duty to follow that stated procedure and may, in fact, be *required* to undertake a procedure that is *more* fair to the claimant *than would usually be employed*. The reasoning underlying this policy is clear: if a given procedure would appear, to the layperson, to require a given result, then that claimant must be assured that, if the expected result is not accrued, he or she was not subjected to an arbitrary exercise of administrative power.

What Legitimate Expectations Have Been Created as Concerns Section 690?

The Department of Justice has furnished a booklet that describes the s. 690 application process.[386] Thus, the doctrine of legitimate expectation is in effect, and the s. 690 process is immunized from the criticism that it is arbitrary.[387] Nonetheless, it is submitted that the process, while not arbitrary, is substantively unhelpful as a means of preventing miscarriages of justice. There are four stages in the s. 690 application process:

(i) initial assessment;

(ii) investigation;

(iii) the preparation of an investigation brief;

(iv) the decision by the Minister.[388]

The purpose of the initial assessment is to determine whether any new *and* significant information, regarding the applicant's case, has emerged. If the Minister does not characterize the information as "new," then the application will be summarily rejected. The Department of Justice's booklet explains this rule, and defines what constitutes "new" information:

> The scetion 690 remedy is not meant to provide a substitute for a court's decision. In assessing an application, the Minister of Justice will not decide whether [the applicant] is guilty or innocent. That is for the courts to decide. The Minister cannot substitute his or her opinion for a jury's verdict or a judge's decision. An application will be denied if it is clear that it is being used as another form of appeal to overturn a court's decision.
>
> Nor is the section 690 application meant to be a substitute for an appeal to a provincial court of appeal. Arguing that there were weaknesses in the evidence presented to the trial or appeal court is not enough. Simply repeating the same evidence or legal arguments that were presented to the trial court and the appeal court is not enough. The Minister cannot just take a different view of the same evidence and arguments that were presented in court.
>
> Information will be considered new if it was not examined by the courts during [the applicant's] trial or if [the applicant] became aware of it after all court proceedings were over.[389]

It is immediately clear that the s. 690 process is incapable of preventing wrongful convictions in the vast majority of cases where "new" evidence is either unavailable or non-existent. The process does not even contemplate the possibility that one can be convicted without error of law, exhaust one's appeals, and yet be innocent:

> Section 690 appears to provide only for a sliver of mercy, not justice, failing in its very structure to acknowledge the inevitability of human fallibility in some small number of criminal convictions.[390]

Section 690 exists to address only those wrongful convictions that cannot be viewed as an indirect indictment of the criminal justice system, those convictions that can be "blamed" on the absence of probative evidence. The *Association in Defence of the Wrongly*

Convicted[391] has referred to the s. 690 process as "unworkable" and "often hostile to those who have the audacity to question their convictions."[392]

In 1989, the *Donald Marshall Inquiry*[393] concluded that an independent conviction review mechanism should be implemented in Canada, presumably along the lines of the *Criminal Cases Review Commission* in England.[394] Provincial and federal Justice Ministers created a working group to investigate such a reform of s. 690, however, the *Marshall Inquiry*'s recommendation was rejected, chiefly for the following reasons:

(i) the *Marshall Inquiry* did not specifically criticize the existing section 690 review mechanism, which is generally satisfactory;

(ii) those convicted of offences have received a fair trial, and had the benefit of appellate procedures;

(iii) a stronger review mechanism would effectively create a further right of appeal that would undermine the finality principle and entail, as a result, higher administrative costs; and

(iv) review of convictions by a non-judicial body would be inappropriate.[395]

While changes were made to the manner in which s. 690 applications were processed,[396] no substantive changes to the type of cases subject to review, under the provision, were contemplated. One may presume that the creation, in England, of the CCRC, had an impact upon the federal Justice Minister's intransigence, regarding the formation of an independent body to review convictions. In 1998, the Minister issued a *Consultation*

Paper to various legal groups, requesting feedback as to how the s. 690 review process could be improved.[397] The Minister raised two main issues: whether an independent body of review should be created and whether there ought to be wider appellate powers to overturn convictions. No report has yet been issued as to the results of that consultation. It is submitted, though, that s. 690, at present, cannot function as an adequate substitute for a broad standard of appellate review. The review of the facts and evidence, of a given case, are simply not contemplated by that provision, such that any but the rarest cases are even likely to be investigated.

Section 686(1)(a)(iii)

Where the trier of fact is a judge, a conviction may be subject to greater review under s. 686(1)(a)(iii), than would otherwise be available under s. 686(1)(a)(i). A number of decisions, originating from Ontario, suggest that a conviction based upon a misapprehension of the evidence may be a miscarriage of justice notwithstanding the fact that the evidence adduced at trial is capable of supporting a conviction. In *R.* v. *Vanloon*,[398] LaForme, J. notes:

> It is to be noted that in *Morrissey* the Court was clear that mere misapprehension of any evidence by a trial judge does not necessarily of itself result in a verdict which is unreasonable. Any misapprehension must, if it is to succeed in demonstrating an unreasonable verdict, be at least misapprehension of significant evidence,[399] and it must form an essential part in the reasons for the conviction. ***Where such misapprehension is found but there is other evidence to support the conviction thus rendering the verdict otherwise reasonable, an appellate court must still consider whether the misapprehension occasioned a miscarriage of justice pursuant to s. 686(1)(a)(iii) of the Criminal Code.*** [emphasis added][400]

The policy reasons for allowing appeals to rest upon the misapprehension of evidence, are similar to those underlying s. 686(1)(a)(i) appeals. Namely, there is an overarching fear that the trier of fact, in convicting an accused, has not turned its mind to relevant

evidence and has convicted on the basis of unstated assumptions and other extraneous unproven data. In *R.* v. *Morrissey*,[401] Doherty, J.A. states:

> When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that *a verdict must be based exclusively on the evidence adduced at trial*. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then... the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. *Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to trial*. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then... it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. *This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction*. [emphasis added][402]

In *R.* v. *G. (G.)*,[403] the Ontario Court of Appeal reiterated the reasoning employed in *Morrissey*:

> [E]rrors in the apprehension or appreciation of evidence, though not error of law and not leading to a finding that the verdict was unreasonable, may none the less call for appellate review because they lead to a miscarriage of justice.[404]

An appellate court is entitled to find that a finder of fact has misapprehended significant aspects of the evidence where the whole of the record discloses a lack of appreciation, or complete disregard, of relevant evidence.[405] This principle, of course, presumes that an appellate court has access to detailed reasons for judgment. Thus, s. 686(1)(a)(iii) cannot be employed as a means of remedying errant fact-findings, where the trier of fact is a jury. Moreover, as noted above,[406] the Supreme Court has held that a trial judge does not have a duty to give reasons for judgment; interpreted broadly, this statement of the law could be read such that s. 686(1)(a)(iii) could not broaden appellate review of questions of fact, *in any case*.[407] However, in *R.* v. *R. (D.)*,[408] the Supreme Court held:

> [*Burns*] does not stand for the proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on

> the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere. *Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions*. The trial judge in this case did not do so. She failed to address the troublesome evidence, and she failed to identify the basis on which she convicted D.R. and H.R. of assault. This is an error of law necessitating a new trial. [emphasis added][409]

It would seem, from this passage, that a trial judge has a duty to give reasons in cases where the evidence is confused and contradictory, and where such evidence is not merely peripheral to the Crown's case.[410] Inasmuch as it is in precisely this sort of case that inherently unreliable evidence may "tip the scales" in favour of the Crown and give rise to a miscarriage of justice, it is possible that s. 686(1)(a)(iii) may be used to offset some of the danger of a miscarriage of justice, facilitated by the judiciary's narrow interpretation of powers of appellate review under s. 686(1)(a)(i).

Postscript

On 17 February 2000, the Supreme Court of Canada released its decision in the case of *R.* v. *Brooks*.[411] The accused was charged with sexually abusing and murdering his nineteen-month-old child. There was ample evidence to support the Crown's contention that the accused had sexually abused the infant, but no direct evidence to support its claim that the accused had delivered the fatal blows. The child had been abused for some time, by the accused and by the infant's mother. The Crown presented two witnesses – jailhouse informants – both of whom claimed that the accused admitted to having killed the child. Both informants had a history of criminal dishonesty, and a history of offering to testify in criminal trials. Furthermore, the informants' testimony lacked certain details that one might have expected in an admission of guilt. Finally, one informant asked the Crown for a lighter sentence on an unrelated offence, in exchange for his testimony; the other had a history of substance abuse and psychiatric problems. The trial judge did not give the jury a *Vetrovec*[412] warning that the two witnesses, being unsavoury characters, were not trustworthy and that, therefore, the jury should not give their testimony substantial weight. The jury convicted the accused. The Ontario Court of Appeal overturned the conviction and ordered a new trial, holding that the trial judge, given the circumstances, was under an obligation to provide the jury with a *Vetrovec* warning. On appeal to the Supreme Court, the verdict at trial was affirmed, and the Court of Appeal's decision reversed. Bastarache J., writing for three members of the panel,[413] held that there was no obligation, on the part of the trial judge, to provide the *Vetrovec*

warning. Bastarache J. reinforced the Court's position, taken since *Vetrovec*, that there is nothing inherently unreliable about jailhouse informant testimony:

> In assessing the credibility of a witness to determine whether to give a *Vetrovec* warning, trial judges must avoid pigeon-holing witnesses into particular categories such as "jail-house informants". Rather, the trial judge should "direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness" (*Vetrovec*, at p. 823). If the trial judge believes the witness can be trusted, then, regardless of whether he or she is an accomplice or a jail-house informant, no *Vetrovec* warning is necessary.[414]

The Court, then, continues to deny that there is any category of evidence that should be treated with skepticism *a priori*. It therefore falls to the trial fact-finder to decide, on an *ad hoc* basis, what evidence may constitute proof and what cannot. The Court, in *Brooks*, has once again failed to erect a firewall against fact-findings which, to any reasonable observer, must be deemed, on their face, suspicious and untrustworthy. There remains no straightforward way for an appellate court to interfere with fact-findings based upon such flimsy evidence as the jailhouse informant's "testimony-for-hire."[415] Bastarache J. reiterated the Court's view that appellate courts ought not to interfere in trial fact-findings, where such findings relate to the credibility of witnesses.

> Appellate courts should show great deference to the findings of credibility made at trial and the importance of taking into consideration the special position of the trier of fact in judging credibility and of having the advantage, denied to the appellate court, of directly observing the testimonies of the witnesses (*R.* v. *W. (R.)*, [1992] 2 S.C.R. 122, at p. 131).[416]

To accord trial fact-finders virtually unlimited discretion over their employment of evidence is to institutionalize practices that are contrary, even hostile, to the Rule of Law. Strong powers of appellate review are necessary to ensure that only the guilty are deprived of their liberty. Canada's failure to incorporate such powers into the criminal justice system is not supported by sound, principled reasoning. When viewed in light of

(a) the appellate review mechanisms of the Commonwealth as a whole; and (b) the "checkerboard" appellate review provisions of the *Criminal Code*, Canada's position represents an arbitrary exercise (or non-exercise) of State power, the effect of which is to deny innocent individuals the right to remain at liberty. If Parliament lacks the political will to see that convictions are supervised by a robust and effective appellate mechanism, then it falls to the judiciary to recognize that the current state of appellate review is violative of the constitutional principles upon which Canada's legal system is built.[417] The courts must, then, read into the *Criminal Code* a view of appellate deference consistent with these principles. At stake is nothing less than Canada's right to call itself a liberal State valuing equality, liberty, and dignity.

Both Binnie J., concurring in the result but not the reasons,[418] and Major J.'s dissent, in *Brooks*, reflect the view that jailhouse informant testimony, while not invariably unreliable, is characteristically so and should be examined skeptically. Binnie J. states:

> "[J]ailhouse informant" is a term that conveniently captures a number of factors that are highly relevant to the need for caution. These include the facts that the jailhouse informant is already in the power of the state, is looking to better his or her situation in a jailhouse environment where bargaining power is otherwise hard to come by, and will often have a history of criminality. This is not to deny the possibility that a jailhouse can on occasion produce a trustworthy witness. The trigger for caution is not so much the label "jailhouse informant" as it is the extent to which these underlying sources of potential unreliability are present in a particular case.[419]

Binnie J. also alludes to the courts' special expertise in "weeding out" unreliable testimony, and suggested that juries ought to be provided with the benefit of that expertise through special instructions:

> It is not sufficient, in my view, to say that these particular witnesses apparently impressed the trial judge as reasonably capable of belief. The concern here is with the underlying weaknesses historically associated with jailhouse confessions offered by fellow inmates.

> *Vetrovec* affirmed that the court may legitimately concern itself with such factors, and this affirmation was picked up and developed by Marc Rosenberg (now Rosenberg J.A.) in "Developments in the Law of Evidence: The 1992-93 Term" (1994), 5 S.C.L.R. (2d) 421, at p. 463:
>
> > It is not then whether the trial judge personally finds the witness trustworthy but whether there are factors which experience teaches that the witness's story be approached with caution.
>
> The jurors will not likely have the benefit of this "experience" unless it is imparted to them by the trial judge in the "clear and sharp warning" contemplated by *Vetrovec*. While some passages in Dickson J.'s reasons can be argued to focus on the assessment of the credibility of a particular witness made by the trial judge, he also emphasized that the credibility of a particular witness is for the jury not the trial judge to assess. The trial judge's role is to provide the proper framework within which that credibility can be evaluated, and in that regard problems historically associated with particular types of evidence should not be overlooked. Jailhouse informants presenting a profile such as Balogh and King, generally do, it seems to me, justify an inference of untrustworthiness, and as a general rule in such cases a *Vetrovec* warning should be given.[420]

By this reasoning, appellate courts may be in a position where they can review the fact-findings at trial, inasmuch as they are able to determine whether, in the case of a particular witness, there exists, from an objective standpoint, special circumstances which would render that witness' *prima facie* unreliable. Major J., writing for the dissent, cited the *Kaufman Report*'s recommendation that jailhouse informant testimony be subject to a mandatory jury instruction:

> In-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove.[421]

In the final analysis of *Brooks*, the majority of the Court held that a jury instruction was required *as a general rule* in cases involving jailhouse informant testimony. The full Court did not write reasons in *Brooks*, and so it is difficult to say whether the approach adopted by Major and Binnie JJ., as concerns the need for a *Vetrovec* warning, represents the law in Canada. Assuming it does, however, *Brooks* may represent a watershed in the

expansion of appellate powers in Canada, creating the conditions for more robust appellate review of trial fact-findings, and finally making good on the liberal promise of liberty and justice.

Notes

[1] *R.* v. *Bernardo*, (1997) 12 C.R. (5th) 310 (Ont. C.A.) [hereinafter *Bernardo*].

[2] *Ibid.* at para. 1[illegible]

[3] *Ibid.* at para. 3. See also Sean Fine, "Bernardo says judge was unfair at his trial" *Globe and Mail*, 19 November 1999, at A1-3.

[4] *R.* v. *Folland*, (1999) 132 C.C.C. (3d) 14 (Ont. C.A.) [hereinafter *Folland*].

[5] Kirk Makin, "Judge apologizes to the man he jailed," *Globe and Mail*, May 22, 1999, A12.

[6] On 27 March 2000, the Ontario Court of Appeal rejected Mr. Bernardo's appeal against his conviction. *R.* v. *Bernardo*, [2000] O.J. No. 949 (C.A.) [hereinafter *Bernardo #2*].

[7] *R.* v. *Brooks*, [2000] S.C.J. No. 12 [hereinafter *Brooks*].

[8] See, in particular, Michael J. Sandel, *Liberalism and the Limits of Justice*, Second Edition (New York: Cambridge University Press, 1998), though Sandel himself questions his affiliation with the communitarian movement, at ix-xvi; Alasdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981); Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983); Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1989).

[9] By "difference," I mean especially differences in ethnicity/race, sexuality/gender, mental/physical ability, political/religious beliefs, cultural practices, and social/economic class.

[10] I say "subversive" because liberalism mandates the perennial questioning and, therefore, destabilization of authority.

[11] John Rawls, *A Theory of Justice*. Revised Edition (Cambridge: Harvard University Press, 1999) at 3.

[12] Sandel, *supra* note 8 at 2.

[13] John Gray, *Liberalism*, Second Edition (Minneapolis: University of Minnesota Press, 1995) at xii.

[14] I leave, to the side, the debate concerning how this moral equality is grounded. For the purposes of this paper, it will be assumed that the liberal respect for moral equality "cashes out" as an equal respect for all conceptions of the good.

[15] Mental incompetents represent the one exception to the general liberal rule that difference is not to be considered in the determination of rights.

[16] It does not follow, however, that all conceptions of the good, for instance those that counsel harm to others, will be equally compatible with the liberal State. Nor does it follow that liberals, as far as moral liberty is concerned, are committed to skepticism.

[17] Thus, distinctly illiberal conceptions of the good may be justly curtailed as being fundamentally irreconcilable with the interests of others, as well as the survival of the liberal community as a whole.

[18] Gray, *supra* note 13 at 57.

[19] *Ibid.* at 58.

[20] Dworkin refers to this view as the "rule-book" conception of the Rule of Law. See Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 11.

[21] *Ibid.* at 11.

[22] Joseph Raz, "The Rule of Law and its Virtue" [1977] 93 *L. Q. Rev.* 195 at 198.

[23] The requirements, as set out by Rawls, are the bare minimum requirements and are therefore consistent with the formalist conception.

[24] Rawls, *A Theory of Justice*, *supra* note 11 at 209. See also Christine Sypnowich, "Proceduralism and Democracy" (1999) 19 *Oxford J. Leg. St.* 649 at 650-1.

[25] The formalist conception also differs from the rights conception in concerning itself solely with State power. The rights conception concerns both public and private power.

[26] Raz, *supra* note 22.

[27] Dworkin, *A Matter of Principle*, *supra* note 20 at 11-2.

[28] T. R. S. Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" [1999] 115 *L. Q. Rev.* 221 at 222-3 [emphasis added].

[29] Raz, *supra* note 22.

[30] *Ibid.* at 203.

[31] Raz, *supra* note 22 at 198-202.

[32] *Ibid.* at 207-8.

[33] For this reason, this paper disputes Paul Craig's defence of Raz's thesis. See "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467 at 481-2.

[34] I leave open the question of whether such matters are properly the subject of the civil law.

[35] To those who would argue that this view of liberalism is so thin as to be ineffective as a means of ensuring *true* equality in those communities in which there exists a tradition of disadvantage for some groups, the response of this paper is, "of course!" The liberal does not seek to build a utopian society where there are no social ills and no conflict; the point of the

liberal enterprise is to avoid the worst-case scenario in which the State directs the full destructive force of its gaze against some unfortunate individual or group.

[36] John Stuart Mill, *On Liberty* (Ontario: Penguin Books, 1985) at 68-9 [emphasis added]. See also Joel Feinberg, *The Moral Limits of the Criminal Law, Volume 1: Harm to Others* (New York: Oxford University Press, 1984) at 31:

> [T]he criminal law system is the primary instrumentality for preventing people from intentionally or recklessly harming one another. Acts of harming then are the direct objects of the criminal law, not simply states of harm as such.

[37] Though I accept that this view of harm may be contested, for the purpose of this paper, I set this contest aside.

[38] Mill, *supra* note 36 at 141-2 [emphasis added]. See also Feinberg, *supra* note 36 at 36:

> Whatever the correct policy may be for the law of contracts, the harm principle as a guide to the moral limits of the criminal law does not license liability for acts that tend to cause only nonharmful wrongs. It is more obvious still that *no plausibly interpreted harm principle could support the prohibition of actions that cause harms without violating rights, for example setbacks to interest incurred in legitimate competitions, or harms to the risk of which the "victim" freely consented... [O]nly setbacks to interest that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense*. [emphasis added]

[39] Rawls, *A Theory of Justice*, *supra* note 11.

[40] Mill *does* make himself more clear later in *On Liberty*, *supra* note 36 at 149.

[41] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press); Ronald Dworkin, *Law's Empire*, (Cambridge: Belknap, 1986); Dworkin, *A Matter of Principle*, *supra* note 20 at 16-8; T. R. S. Allan, "Dworkin and Dicey: The Rule of Law as Integrity" (1988) 8:2 *Oxford J. Legal Studies* 266; Jeremy Waldron, "The Rule of Law in Contemporary Political Theory" (1989) 2:1 *Ratio Juris* 79 at 82-4.

[42] Allan, "Dworkin and Dicey," *ibid.* at 266.

[43] *Ibid.* at 266-7.

[44] Philip Selznick, *Law, Society, and Industrial Justice* (New York: Russell Sage Foundation, 1969) at 13.

[45] Note that mere efficaciousness of the law in question cannot speak in its favour; an incoherent or vague law *may* have a "chilling effect" upon the behaviour it was intended to target. Who knows? The point is that it is impossible to know what sort of conduct the law was supposed to address at first instance, so there is no way of judging whether the law accomplished that hypothetical goal. Thus, any criticism or advocacy of the law is stifled from the start.

[46] The Rule of Law, therefore, presumes that offences will include, in their definition, a *mens rea* requirement.

[47] Summers, "The Ideal Socio-Legal Order: Its 'Rule of Law' Dimension" (1988) 1 *Ratio Juris* 154 at 160.

[48] This is supported by George P. Fletcher's assertion that only certain *ex post facto* laws are properly the concern of the *nulla poena* principle, namely, those laws that "infringe on what individuals have a right to know when they act." George P. Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998) at 13.

[49] Francis A. Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* (New York: Oxford University Press, 1996) at 5-6.

[50] See Mill, *supra* note 36 at 129.

[51] *Ibid.*at 15. See also Franz Kafka, "Before the Law" in Nahum N. Glatzer, ed., *The Complete Stories* (New York: Schocken Books, 1971) 3 at 4:

> "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and, to let his failing senses catch the words, roars in his ear, "No one else could ever be admitted here, *since this gate was made only for you.* I am now going to shut it." [emphasis added]

[52] Allan, "The Rule of Law as the Rule of Reason," *supra* note 28 at 222-3.

[53] Rawls, *A Theory of Justice*, *supra* note 11 at 210.

[54] Robert S. Summers, "A Formal Theory of the Rule of Law" (1993) 6:2 *Ratio Juris* 127 at 134.

[55] Jeffrey Reiman and Ernest van den Haag, "On the Common Saying That it is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: Pro and Con" in Ellen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul, eds., *Crime, Culpability, and Remedy* (Cambridge: Basil Blackwell, 1990) 226 at 238.

[56] Cf. Raz, *supra* note 22 at 201.

[57] B. V. Harris, "Judicial Review of the Prerogative of Mercy?" [1991] *Public Law* 386.

[58] Summers, *supra* note 54 at 133. See also Wayne Renke, *Invoking Independence: Judicial Independence as a No-cut Wage Guarantee*, Points of View No. 5 (Alberta: Centre for Constitutional Studies, 1994) at 5.

[59] *R.* v. *Valente*, [1985] 2 S.C.R. 673 [hereinafter *Valente*].

[60] *Ibid.* at 689.

[61] Renke, *supra* note 58 at 8-9.

[62] *Ibid.* at 9-11.

[63] John Rawls, "Punishment as a Practice" in Jeffrie G. Murphy, ed., *Punishment and Rehabilitation*, Second Edition (Belmont: Wadsworth Publishing Co., 1985) 68 at 71.

[64] I leave to the side the question of who falls into the category of "victim," that is whether society as a whole may be deemed "victimized."

[65] Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd, tr. (Indianapolis: Bobbs-Merrill, 1965) at 99-106.

[66] Herbert Morris, "Persons and Punishment" (1968) 52:4 *The Monist* 475-501.

[67] Note the distinction to be drawn between *education* and *treatment*. The former supposes that the individual is capable of making rational choices where he is provided with sufficient information and permitted to "sample" competing arguments. Treatment supposes that individuals err because of some inherent flaw in their biological make-up, such that they may be diverted from error not through rational argument or the provision of factual data, but through some direct influence, on the part of the State, upon the biological, sub-rational components of the person.

[68] This paper concerns itself exclusively with appeals from conviction on questions of fact that arose at trial. This paper only peripherally concerns itself with appeals based upon fresh evidence. Furthermore, no distinction in principle will be drawn between the judge as fact-finder and the jury as fact-finder; an appellate court, it is submitted, is entitled to review both equally.

[69] Donovan Committee, *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (London: Cmnd. 2755, 1965) at 3. See also C.H. O'Halloran, "Development of the Right of Appeal in England in Criminal Cases" (1949) 27 *Can. Bar Rev.* 153 at 154.

[70] *Criminal Appeal Act*, (U.K.), 1907, 7 Edw. 7, c. 23.

[71] U.K., H.C., *Parliamentary Debates*, pp. 1008-9 (17 April 1907). See also U.K., H.C., *Parliamentary Debates*, pp. 186-94 (31 May 1907); U.K., H.C., *Parliamentary Debates* (19 July 1907); U.K., H.C., *Parliamentary Debates*, pp. 631-5 (29 July 1907).

[72] U.K., H.C., *Parliamentary Debates*, p. 1484 (5 Aug. 1907).

[73] See R. Pattenden, *English Criminal Appeals: 1844-1944* (Oxford: Clarendon Press, 1996) at 31: "The only way to reverse the public belief that miscarriages of justice were an everyday occurrence... was by the establishment of a court capable of hearing appeals of fact, law, and sentence." Despite Professor Pattenden's view that the passage of the Criminal Appeal Bill was more or less inevitable, some commentators appear to have been of the view, at the time, that the Bill was doomed. See "Another Criminal Appeal Bill" (1907) 6 *Can. L. Rev.* 280.

[74] Pattenden, *ibid.* at 28-30; Donovan Committee, *supra* note 69 at 32; N. W. Sibley, *Criminal Appeal and Evidence* (London: Fisher Unwin, 1908) at 301-5. See also "The Adolf Beck Case" (1905) 4 *Can. L. Rev.* 60.

[75] *Parliamentary White Paper on the Case of George Edalji*, April 23, 1907, in Sibley, *ibid.*at 370-7.

[76] Pattenden, *supra* note 73 at 30; Sibley, *ibid.* at 306-34.

[77] *R.* v. *Williamson*, (1908) 1 Cr. App. R. 3, *The Times*, May 16 1908 [hereinafter *Williamson*]; *R.* v. *McNair*, (1909) 2 Cr. App. R. 2 [hereinafter *McNair*]; *R.* v. *Simpson*, (1909) 2 Cr. App. R. 126 [hereinafter *Simpson*]; *R.* v. *Graham*, (1910) 4 Cr. App. R. 218 [hereinafter *Graham*]; *R.* v. *Bradley*, (1910) 4 Cr. App. R. 225 [hereinafter *Bradley*]; *R.* v. *Parker*, (1911) 6 Cr. App. R. 285 [hereinafter *Parker*]; *R.* v. *Hart*, (1914) 10 Cr. App. R. 176 [hereinafter *Hart*]; *R.* v. *Baskerville*, (1916) 12 Cr. App. R. 81 [hereinafter *Baskerville*]; *R.* v. *Wallace*, (1931) 23 Cr. App. R. 32 [hereinafter *Wallace*]; *R.* v. *Barnes*, (1942) 28 Cr. App. R. 141 [hereinafter *Barnes*]; *R.* v. *Dent*, (1943) 29 Cr. App. R. 120 [hereinafter *Dent*]; *R.* v. *Cooper and Compton*, (1947) 32 Cr. App. R. 102 [hereinafter *Cooper and Compton*].

[78] *Bradley*, *ibid.* at 228.

[79] *Parker*, *supra* note 77.

[80] *Hart*, *supra* note 77 at 178.

[81] *Baskerville*, *supra* note 77 at 88.

[82] *Wallace*, *supra* note 77 at 34-5.

[83] See also *Barnes*, *supra* note 77 at 149, in which the Court discussed the meaning of its statutory power to set aside a conviction "on the ground that it is unreasonable or cannot be supported having regard to the evidence:"

> Those last words have been interpreted in more than one case in this Court as amounting to this: if the Court thinks that the verdict is, on the whole, having regard to everything that took place in the Court of trial, unsatisfactory.

[84] Donovan Committee, *supra* note 69 at 32.

[85] The phrase was rejected, by the Attorney-General, as obscure and unscientific.

[86] Donovan Committee, *supra* note 69 at 1, 31-5. See also R. Buxton (now Buxton J.), "Miscarriages of Justice and the Court of Appeal" (1993) 109 *Law Q. Rev.* 66 at 68-9.

[87] U.K., H.L., *Parliamentary Debates*, p. 247 (21 June 1966).

[88] Donovan Committee, *supra* note 69 at 1, 31-5.

[89] U.K., H.L., *Parliamentary Debates*, p. 812 (12 May 1966).

[90] *Criminal Appeal Act* (U.K.), 1968, c. 19.

[91] The Court of Criminal Appeal became, with the mid-1960s amendments, the Court of Appeal (Criminal Division).

[92] "Conviction" replaced "the verdict of the jury" as a result of an amendment in the *Criminal Law Act 1977* (U.K.), s. 44.

[93] *R.* v. *Cooper*, (1968) 53 Cr. App. R. 82 [hereinafter *Cooper*].

[94] *Ibid.* at 86. See also *Stafford* v. *D.P.P.*, (1973) 58 Cr. App. R. 256 (H.L.) [hereinafter *Stafford*], where the House of Lords agreed with the interpretation provided in *Cooper*.

[95] London, 1989.

[96] Chairman, Viscount Runciman of Doxford, (London: HMSO, 1993) [hereinafter *Runciman Report*].

Many of the points raised hereafter were originally raised in an earlier paper, entitled "Appellate Deference on Questions of Fact in Criminal Cases: The 'Lurking Doubt' Standard in England and Canada" (scheduled for publication in July 2000) 38:3 *Alta. L. Rev.*

[97] Buxton, *supra* note 86 at 66. Buxton cites, particularly, *R.* v. *Callaghan*, (1989) 88 Cr. App. R. 40 [hereinafter *Callaghan*]; *R.* v. *McIlkenny*, (1991) 93 Cr. App. R. 310 ("the two 'Birmingham Six' appeals") [hereinafter *McIlkenny*]; *R.* v. *Armstrong*, C.A.C.D., October 16, 1989 ("the 'Guildford Four'") [hereinafter *Armstrong*]; *R.* v. *Maguire*, (1991) 94 Cr. App. R. 133 [hereinafter *Maguire*]; *R.* v. *Silcott, The Times*, December 9, 1991 [hereinafter *Silcott*]; *R.* v. *Ward*, [1992] N.L.J. 859 [hereinafter *Ward*].

[98] *Runciman Report*, supra note 96 at 168, para. 31.

[99] For instance, where there is no doubt about an appellant's guilt, there may yet be a concern that some legal formality was ignored and that this event, if left unremedied with an acquittal, would bring the administration of justice into disrepute. See *R.* v. *Llewellyn*, 67 Cr. App. R. 149 at 157 [hereinafter *Llewellyn*].

[100] Buxton, *supra* note 86 at 69n.

[101] *Runciman Report*, *supra* note 96 at 168, para. 29.

[102] J.C. Smith, "The Criminal Appeal Act 1995: (1) Appeals Against Conviction" [1995] *Crim. L. Rev.* 920 at 921.

[103] *Runciman Report*, *supra* note 96 at 170-1, paras. 40-4.

[104] K. Malleson, "Appeals Against Conviction and the Principle of Finality" in Field and Thomas, eds., *Justice and Efficiency? The Royal Commission on Criminal Justice* (Oxford: Blackwell, 1994) at 153-4 [emphasis in original].

[105] *Runciman Report*, *supra* note 96 at 169-72.

[106] (U.K.) 1995, c. 35; came into force 1 January 1996.

[107] This alteration of the language, recommended by the *Runciman Report*, met with some opposition in both Houses of Parliament, as well as by 'Justice.' Smith, *supra* note 102 at 921-2 See also Anne Owers, "Not Completely Appealing" (1995) 145 *New L. J.* 353; Hansard 256, col. 75, col 104.

[108] Smith, *ibid.* at 922.

[109] *Ibid.* at footnote 7.

[110] U.K., H.C., *Parliamentary Debates*, pp. 1008-9 (17 April 1907).

[111] For instance, one may rightly wonder whether, had the subjective standard of review been available when George Edalji was wrongfully convicted, that standard would have worked in his favour or whether his ethnic background would have precluded an effective review.

[112] Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 23.

[113] *R.* v. *Graham et al.*, [1997] 1 Cr. App. R. 302 [hereinafter *Graham*].

[114] *Ibid.* at 307-8.

[115] The significance of this point is that it allows an appellate court to ignore issues of demeanour if it so chooses. This greatly expands the *de facto* power of the court to reverse convictions. See, *infra*, my discussion of demeanour.

[116] *R.* v. *F.*, [1998] E.W.J. No. 4346, T.N.L.R. No. 703 (C.A. (Crim. Div.)).

[117] Buxton, *supra* note 86 at 69n.

[118] See Chapter II.3.

[119] See, for example, *Criminal Appeal Act* (N.S.W.), 1912, s. 6.1; *Crimes Act* (Vict.), 1958, s. 568(1).

[120] *McKay* v. *The King*, (1935) 54 C.L.R. 1 (H.C.A.) [hereinafter *McKay*].

[121] *Ibid.* at 9-10.

[122] *Davies and Cody* v. *The Queen*, (1937) 57 C.L.R. 170 (H.C.A.) [hereinafter *Davies*].

[123] *Ibid.* at 180.

[124] *Ibid.* at 182.

[125] *Raspor* v. *The Queen*, (1958) 99 C.L.R. 346 (H.C.A.) [hereinafter *Raspor*].

[126] *Ibid.* at 352.

[127] *Plomp* v. *The Queen*, (1963) 110 C.L.R. 234 (H.C.A.) [hereinafter *Plomp*].

[128] *Ibid.* at 244.

[129] See *Hayes* v. *The Queen*, (1973) 47 A.L.J.R. 603 at 605 (H.C.A.) [hereinafter *Hayes*], where Barwick C.J. states that "[Dixon C.J., in *Plomp*] was not, nor am I, taking the view that the

court's function under this formula is the same as that which the Court of Criminal Appeal in England has decided is to be performed [under the *Criminal Appeal Act* 1968]."

130 Consider the discussion in Chapter II.1, which concerns the connection between the need for finality of cases and the Rule of Law.

131 *Ratten* v. *The Queen*, (1974) 131 C.L.R. 510 (H.C.A.) [hereinafter *Ratten*].

132 *Ibid.* at 516. Contrast this statement of the law with the approach taken in the Canadian Supreme Court decisions of *R.* v. *Corbett*, *infra* note 166, and *R.* v. *Yebes*, *infra* note 180. There, the Court held that it was immaterial that the appellate court would not have arrived at the same verdict as the jury, if the court found that the jury could reasonably have reached that verdict.

133 See Chapter III for the discussion on the finality principle and the expertise (or lack thereof) of appellate judges.

134 I have deliberately left open the issue as to what *kind* of constraint may be imposed upon appellate judges by the legal community. I am content to allow Ronald Dworkin and Stanley Fish to fight out this point. See Stanley Fish, "Interpretation and the Pluralist Vision" (1982) 60 *Texas L. Rev.* 495; Ronald Dworkin, "Law as Interpretation" (1982) 60 *Texas L. Rev.* 527; Stanley Fish, "Working on the Chain Gang: Interpretation in Law and Literature" (1982) 60 *Texas L. Rev.*; Ronald Dworkin, "My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More" in W. Mitchell, ed., *The Politics of Interpretation* (1983); Stanley Fish, "Wrong Again" (1983) 62 *Texas L. Rev.* 299.

135 *Whitehorn* v. *The Queen*, (1983) 152 C.L.R. 657 (H.C.A.) [hereinafter *Whitehorn*].

136 *Ibid.* at 687-9.

137 *Ibid.* at 687.

138 *Chamberlain and Another* v. *The Queen (No. 2)*, (1983) 153 C.L.R. 521 (H.C.A.) [hereinafter *Chamberlain*].

139 Deane J., in dissent, endorsed the *Ratten* approach: *ibid.* at 617, 621.

140 *Chamberlain*, *supra* note 138 at 531-2 (per Gibb C.J. and Mason J.).

141 *Ibid.* at 600.

142 *Ibid.* at 600. See, however, the discussion of demeanour in Chapter III.

143 *Ibid.* at 604.

144 *Ibid.* at 569.

145 Despite the English Court of Appeal's ruling in *R.* v. *F.*, *supra* note 116, I will still occasionally use the phrase "lurking doubt" because I find its import to be the same as the Court's decision in *Graham*, *supra* note 108.

146 *M.* v. *The Queen*, (1994) 181 C.L.R. 487 (H.C.A.).

147 *Ibid.* at 494-5. See also *Jones* v. *R.*, (1997) 149 A.L.R. 598 at 610 (H.C.) [hereinafter *Jones*], where the Court held that jury acquittals on two counts could only mean that the jury did not believe the evidence of the complainant; this meant that the conviction on the third count was necessarily unsafe. See also *Palmer* v. *R.*, (1998) 151 A.L.R. 15 (H.C.) [hereinafter *Palmer*], where the Court held that alibi evidence, disregarded by the jury, necessarily meant that the verdict was unsafe; this suggests that the Court may be operating from the view that an accused's testimony is *prima facie* reliable. See also *Gipp* v. *R.*, (1998) 155 A.L.R. 15 (H.C.) [hereinafter *Gipp*].

148 Section 743.

149 Section 747. This provision was described, by Professor Del Buono, as "a significant departure from the previous limitation that the only proper questions for appeal were questions of law." V.M. Del Buono, "The Right to Appeal in Indictable Cases" (1978) 16 *Alta. L. J.* 446 at 454.

150 (Can.), 1923, 13-4 Geo. 5, c. 41, s. 9.

151 *Criminal Code* (1923), ss. 1013(1) and 1014(1).

152 At the same time, it is, on its face, odd that the Senate would refer to the Beck and Edlaji cases which, by this time, would have been almost 20 years old. The references to Beck and Edalji could signify, as well, a feeling in the Senate that there was no great urgency to the problem of rectifying miscarriages of justice.

153 Hansard, (1921) Senate, at 476-84, 781-5; Hansard, (1922) Senate, at 46-7; Hansard, (1923) Senate, at 64. See also Del Buono, *supra* note 149 at 458-60.

154 *Criminal Code* (1999), s. 686(1)(a)(i).

155 *R.* v. *Epstein et al.*, (1925) 43 C.C.C. 348 (Ont. C.A.) [hereinafter *Epstein*].

156 *R.* v. *Derby*, (1924) 42 C.C.C. 152 (Alta. C.A.) [hereinafter *Derby*].

157 *R.* v. *Yates*, (1946) 85 C.C.C. 334 (B.C. C.A.) [hereinafter *Yates*].

158 *R.* v. *Lovering*, (1948) 92 C.C.C. 65 (Ont. C.A.) [hereinafter *Lovering*].

159 *Wallace*, *supra* note 77.

160 *Lovering*, *supra* note 158 at 73-7.

161 *R.* v. *Harrison*, (1951) 100 C.C.C. 143 at 149-54 (B.C. C.A.) [hereinafter *Harrison*].

162 *R.* v. *McDonald*, (1951) 101 C.C.C. 78 (B.C. C.A.) [hereinafter *McDonald*].

163 This is an interesting aside, for it suggests that appellate courts have *always* had jurisdiction to overturn particularly grievous fact-findings, because such fact-findings constitute errors of *law* (perhaps on the ground that such fact-findings can only result from a reversal of the burden of proof).

[164] *McDonald*, *supra* note 162 at 84.

[165] *R.* v. *Boyd*, (1953) 105 C.C.C. 146 (Ont. C.A.) [hereinafter *Boyd*].

[166] *R.* v. *Groulx*, (1953) 105 C.C.C. 380 (Ont. C.A.) [hereinafter *Groulx*].

[167] *R.* v. *Corbett*, [1975] 25 C.R. 275 (S.C.C.) [hereinafter *Corbett*].

[168] For other cases where the "unsafeness" test was applied, see *Forget* v. *The Queen*, (1954) 18 C.R. 233 (Que. C.A.) [hereinafter *Forget*]; *Brown* v. *The Queen*, (1954) 110 C.C.C. 78 (N.B. C.A.) [hereinafter *Brown*]; *R.* v. *Cannon and Egley*, (1955) 111 C.C.C. 158 (B.C. C.A.) [hereinafter *Cannon*]; *R.* v. *Bursey*, (1957) 118 C.C.C. 219 (Ont. C.A.) [hereinafter *Bursey*]; *R.* v. *Bishop*, (1960) 128 C.C.C. 390 (B.C. C.A.) [hereinafter *Bishop*]; *R.* v. *Rusnak*, [1963] 1 C.C.C. 143 (B.C. C.A.) [hereinafter *Rusnak*]; *R.* v. *Inglehart*, [1968] 1 C.C.C. 211 (B.C. C.A.) [hereinafter *Inglehart*]; *R.* v. *Dhillon*, (1972) 9 C.C.C. (2d) 414 (B.C. C.A.) [hereinafter *Dhillon*].

[169] Now s. 686(1)(a)(i).

[170] *R.* v. *Corbett*, (1973) 11 C.C.C. (2d) 137 at 163-7 (B.C. C.A., dissent) [hereinafter *Corbett* (B.C. C.A.)].

[171] *Corbett*, *supra* note 167 at 279-82.

[172] See, for example, *R.* v. *Moore*, (1983) 9 C.C.C. (3d) 1 at 9 (B.C. C.A.), aff'd [1988] 1 S.C.R. 1097 [hereinafter *Moore*]; *R.* v. *Gale*, (1984) 42 C.R. (3d) 94 (B.C. C.A.) [hereinafter *Gale*].

[173] *Corbett*, *supra* note 167 at 279-82. The Supreme Court offered no authorities for Pigeon J.'s above formulation of an appellate court's jurisdiction.

[174] *Corbett* (B.C. C.A.), *supra* note 170 at 163-7; cited in *Corbett*, *supra* note 167 at 279-82.

[175] This is a peculiar passage. Pigeon J. distinguishes between an "unreasonable" verdict and an "unjustified" verdict, yet it is unclear what he could mean by such a distinction. Surely an unreasonable verdict is unreasonable precisely because it is unjustified, and a justified verdict must *a priori* also be reasonable.

[176] Thus, the *Corbett* test is *prima facie* more onerous than the test laid down in *Ratten*, *supra* note 131, by the High Court of Australia, because the former obliges the appellate court to rule in favour of the conviction in the face of any gaps in the transcript.

[177] Thus, the question of what constitutes a "deficiency" in the evidence is a central one, upon which may hinge the question of whether Pigeon J.'s judgment directs an unreasonableness (in the narrow sense) standard or a safeness (in the sense of *constrained* subjectivity) standard. As matters currently stand, it seems plain that the Supreme Court would not regard mere lack of corroboration as a deficiency in the evidence: *R.* v. *Vetrovec*, [1982] 1 S.C.R. 811, 67 C.C.C (2d) 1, 27 C.R. (3d) 304 [hereinafter *Vetrovec*]. Nor would hearsay evidence be deemed *prima facie* unreliable: *R.* v. *B. (K.G.)*, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257, [hereinafter *B. (K.G.)*]; *R.* v. *Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92 [hereinafter *Khan*]; *R.* v. *F. (W.J.)*, [1999] S.C.J. No. 61 [hereinafter *F. (W.J.)*]. However, at the time when *Corbett* was decided, it was good law

that failure to instruct a jury on the uses to which it may put certain uncorroborated statements constituted an error of law; also that hearsay was *prima facie* unreliable. This leads one to suspect that *Corbett* represents a sliding scale of appellate deference, that it represented, when it was decided, a broader power of appellate review than it would if it were decided today.

178 One wonders, too, if there is any disagreement between Laskin J. (as he then was), writing in dissent, and Pigeon J. Laskin J. approves, at 290, the following passage, from *Inglehart, supra* note 168 at 215:

> *It is not the function of the Court to retry an appellant or decide his innocence or guilt. That is for the jury.* It is the duty of the Court [of Appeal] to... set aside a verdict of a jury, even if there is some evidence upon which the latter could find guilt, if it is determined that the charge is not proved with a certainty necessary to support a verdict of guilty and on the facts a conviction would be unsafe and the verdict on the whole unsatisfactory. [emphasis added]

Laskin J. concluded, at 293, that "if a verdict was unsafe or unsatisfactory it was not reasonable." While the language endorsed and employed by Laskin J. certainly differs from that used by Pigeon J., both, whether implicitly or explicitly, appear to advocate broad powers of review of convictions for appellate courts while nonetheless attempting to cut those powers short of utter subjectivity. The dissent and majority may not be far apart in their respective views of the law.

179 *Inglehart, supra* note 168 at 215; cited in *Corbett, supra* note 167.

180 It is trite to suggest that, although the jury is only concerned with the question of whether there is a reasonable doubt as to guilt (and therefore not charged with the burden of finding guilt or innocence *per se*), since there is a presumption of innocence, a finding of reasonable doubt amounts to a finding of innocence.

Again, contrast this approach with that in *Ratten, supra* note 131.

181 For this reason, it could be said that an appeal on a question of fact is always, in reality, a question of mixed fact and law, insofar as the appellate court is making a ruling as to the boundaries of probative value as opposed to prejudicial effect. McIntyre J. says much the same thing in *R.* v. *Yebes*, [1987] 2 S.C.R. 168, 36 C.C.C. (3d) 417 at 426-7 [hereinafter *Yebes*]:

> It may be thought that [section 613(1)(a)(i) (now section 686(1)(a)(i))] does not in a strict sense raise a question of law... It is frequently difficult to draw a clear line between a question of law and a question of fact. While the law can be stated in isolation from the facts, abstract statements of law unconnected to facts are vague and elusive. Even when two judges state the law in precisely the same terms each may actually differ in his understanding of the law and the requirements for its application... Under s. 613(1)(a)(i) of the Code, a court of appeal is required to decide whether the verdict of the jury was unreasonable. While this involves a reconsideration of the facts, it also requires the court to resolve a question of law by giving legal content to the concept of "unreasonable".

182 On the other hand, Canadian advocates of a "lurking doubt" standard of appellate review, properly cite the Supreme Court's decision in *R.* v. *Comba*, [1938] S.C.R. 396 [hereinafter *Comba*], where Duff C.J.C. issues, at 397-8, the following comments:

> [T]he learned trial judge ought, on the application made by counsel for the prisoner at the close of the evidence for the Crown, to have told the jury that in view of the *dubious nature* of the evidence, it would be *unsafe* to find the prisoner guilty and to have directed them to return a verdict of acquittal accordingly. [emphasis added]

Comba is a directed verdict case. It seems reasonable that the standard for directed verdicts would be closer to the standard for appealing convictions, than is the standard for preliminary hearings, because, at the close of the Crown's case, the defence, through cross-examination of Crown witnesses, may have demonstrated that the Crown's case should not be allowed to result in a conviction. At the same time, it also seems clear that a "lurking doubt" standard of review for either directed verdicts or preliminary inquiries, is far too broad a discretion to take cases away from juries. Having said this, the Supreme Court's decision, in *U.S.A.* v. *Sheppard*, [1977] 2 S.C.R. 1067 [hereinafter *Sheppard*], to the effect that the burden of proof for a directed verdict is the same as that for a preliminary hearing, is difficult to grasp, given the greater amount of evidence viewed prior to the issuance of a directed verdict. *Sheppard*, which held that a directed verdict can only be issued where there is no evidence as to an element of the offence in question, is even more difficult to fathom. See also *Charemski* v. *The Queen*, (1998) 15 C.R. (5th) 1 (S.C.C.) [hereinafter *Charemski*]; *R.* v. *Monteleone*, (1987), 35 C.C.C. (3d) 193 (S.C.C.) [hereinafter *Monteleone*]; *R. v. Mezzo*, [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97, 52 C.R. (3d) 113 [hereinafter *Mezzo*]; David M. Tanovich, "Upping the Ante in Directed Verdict Cases Where the Evidence is Circumstantial" (1998) 15 C.R. (5th) 21; R.J. Delisle, "Evidence – Tests for Sufficiency: *Mezzo* v. *The Queen*" (1987) 66 *Can. Bar Rev.* 389; Glanville Williams, "The Application for a Directed Verdict – I" [1965] *Crim. L. R.* 343.

183 Two points must be stressed. First, the presumption that a trial was, or will be, in order, is a function of the finality principle, which will be explained further herein. Second, this passage suggests that an "unsafeness" approach to review – as Pigeon J. understands it - will be as unsuccessful, in overturning convictions arising out demeanour-based credibility findings, as would be "unreasonableness" standards. This is because the unwritten quality of witnesses' demeanour would seem to render all such cases immune to appellate review, as a result of the presumption that the trial was discharged appropriately. What will be explored further herein is the notion that findings of demeanour are of such questionable merit, that such findings should not be presumed to have a meaningful role in the reaching of the verdict. That being the case, the principle of finality would not bar appellate review of what are now considered "demeanour contests" because such contests would no longer exist; the appellate court could presume that the transcript represented the whole of the case on review.

184 I take this as obvious. However, given the Supreme Court's outstanding respect for the sophistication of juries, it may be somewhat controversial to suggest that appellate courts are better equipped to judge the merits of certain kinds of evidence. See, for example, *Vetrovec*, *supra* note 177; *B. (K.G.)*, *supra* note 177; *Khan*, *supra* note 177; *F. (W.J.)*, *supra* note 177.

185 The leading case, on fresh evidence applications in Canada, is *R.* v. *Price*, [1993] 3 S.C.R. 633 [hereinafter *Price*], where the Court held that, if the evidence demonstrates that a miscarriage of justice could have resulted from the evidence not being shown to the trial finder of fact, the application should be allowed irrespective of whether or not defence counsel satisfied the due diligence aspect of the *Palmer* test.

186 For this reason, the question posed earlier, as to whether demeanour is a bar to appellate review of convictions, is particularly compelling where the case in question is a sexual assault or

some other "credibility contest" situation. Given that, as things stand in such cases, primary facts are largely based upon findings relating to demeanour, the inability, of an appellate court, to review demeanour amounts to an inability to review an entire class of cases.

187 Cf. *Vetrovec*, *supra* note 177; *B. (K.G.)*, *supra* note 177; *Khan*, *supra* note 177; *F. (W.J.)*, *supra* note 177. As noted above, changes in judicial treatment of uncorroborated testimony and the hearsay rule may have had the ancillary effect of transforming the *Corbett* decision into one that directs an unreasonableness standard (in the narrow sense).

188 *Moore*, *supra* note 172 at 9.

189 *Yebes*, *supra* note 181 at C.C.C. 430.

190 *Ibid.*at 426.

191 Unhappily, what it means to "act judicially" was never explored by the Court.

192 *Yebes*, *supra* note 181 at C.C.C. 430.

193 *Ibid.* at 430.

194 *Ibid.* at 430.

195 *R.* v. *S. (P.L.)*, [1991] 1 S.C.R. 909.

196 *Ibid.* at 915-6. See also *R.* v. *W. (R.)*, [1992] 2 S.C.R. 122 at 128, 131.

197 *R.* v. *P. (I.)*, (1997) 193 A.R. 127 (C.A.).

198 *Ibid.* at 132.

199 *R.* v. *H. (E.F.)*, (1996) 105 C.C.C. (3d) 233 (Ont. C.A.).

200 The Court also commented upon "the bizarre nature" of much of the Complainant's evidence.

201 *R.* v. *H. (E.F.)*, *supra* note 199 at 239.

202 *R.* v. *Irani*, (1996) 81 B.C.A.C. 203 [hereinafter *Irani*].

203 *R.* v. *Guyatt*, (1997) 119 C.C.C. (3d) 304 (B.C. C.A.) [hereinafter *Guyatt*].

204 *Ibid.* at 324-5; *Irani*, *supra* note 202 at 227.

205 *R.* v. *Malcolm*, (1993) 81 C.C.C. (3d) 196 (Ont. C.A.) [hereinafter *Malcolm*].

206 *Ibid.* at 205-7. See also *R.* v. *Izzard*, (1990) 54 C.C.C. (3d) 252 at 256f-g (Ont. C.A.) [hereinafter *Izzard*]; *R.* v. *C. (V.)*, [1993] O.J. No. 1512 at para. 9 (C.A.); *R.* v. *Meaney*, (1996) 111 C.C.C. (3d) 55 at 88-9 (Nfld. C.A.) [hereinafter *Meaney*]; *R.* v. *Quach*, (1995) 107 Man. R. (2d) 127 at 135-7 (C.A.) [hereinafter *Quach*]; *R.* v. *Jussila*, (1998) 124 C.C.C. (3d) 262 at 268

(B.C. C.A., dissent), aff'd [1998] 1 S.C.R. 755 [hereinafter *Jussila*]; *R.* v. *G. (A.)*, (1998) 130 C.C.C. (3d) 30 (Ont. C.A., dissent).

207 *R.* v. *Burke*, [1996] 1 S.C.R. 474 [hereinafter *Burke*].

208 *Ibid.* at 482. See also *R.* v. *Nikolovski*, [1996] 3 S.C.R. 1197 at 1218, 1229 [hereinafter *Nikolovski*], where the Supreme Court may have split on the issue of whether "safeness" should be read into section 686(1)(a)(i): Major J., in holding that the conviction should be quashed, noted that the conviction in question was "unsafe and unsatisfactory." Cory J. was more cautious, saying only that the conviction was neither "unreasonable *or* unsafe. [emphasis added]"

209 F. Kaufman, *Report of The Commission on Proceedings Involving Guy Paul Morin* (Canada: 1998) [hereinafter *Kaufman Report*].

210 *Ibid.* at Vol. 2, Recommendation 87, 1189-90.

211 *Ibid.*at 1178.

212 S.C.C. Nos. 26570, 26645, 26924.

213 *R.* v. *Brown*, [1993] 2 S.C.R. 918 [hereinafter *Brown*].

214 *Ibid* at para. 11.

215 See *R.* v. *Askov*, [1990] 2 S.C.R. 1199 [hereinafter *Askov*]:

> The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. *It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community*. Continued community support for our system will not endure in the face of lengthy and unreasonable delays. [emphasis added]

216 *Schwartz* v. *Canada*, [1996] 1 S.C.R. 254 [hereinafter *Schwartz*].

217 *Ibid.* See also *R.* v. *Van der Peet*,, (1996) 109 C.C.C. (3d) 1 at 34 (S.C.C.) [hereinafter *Van der Peet*].

218 See Alan Ryan, "Liberalism" in Goodin and Pettit, eds., *A Companion to Contemporary Political Philosophy* (1993) 291 at 298-9, for a glimpse at the State's duty to act efficiently in its dealings with citizens:

> [P]olitical authority exists for purely secular ends, towards which we should adopt a rational, scientific attitude, adjusting our political institutions and our policies in an instrumentally efficient way.

[219] I must confess to finding this claim overstated. Traditionally, through the exercise of jury nullification, juries functioned as a means of "humanizing the law," of forcing the criminal law to conform to community practices, expectations and values. In Canada, however, juries are not empowered to "nullify" the criminal law. How, then, is the community truly being represented by the jury in a meaningful sense? The jury is not entitled to determine guilt or innocence on the basis of community practices, but on the basis of the test laid down by the criminal statute. It seems that the jury is performing the same role as a judge sitting alone.

[220] Charles Alan Wright, "The Doubtful Omniscience of Appellate Courts" 41 *Minn. L. Rev.* 751 at 781.

[221] J. Fortescue, *De Laudibus Legum Angliae*, Chimes, ed. (Cambridge: University Press, 1949) Ch. 27, p. 63.

[222] William Blackstone, *Commentaries on the Laws of England* (New York, 1858) Vol. IV at 358. For the justification of this principle, see Chapter I.

[223] *Van der Meer* v. *R.*, (1988) 82 A.L.R. 10 (H.C.) [hereinafter *Van der Meer*].

[224] *Ibid.* at 31.

[225] *U.S.* v. *Garsson*, 291 F. 646 (S.D.N.Y., 1923) [hereinafter *Garsson*].

[226] *Ibid.* at 649.

[227] *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*].

[228] *Ibid.* at 606.

[229] It should be plain that, in speaking of the Rule of Law, I am thinking of the Rule of Law as justice, as opposed to the Rule of Law as "Rule by Rules." See, for a look at this distinction, Chapter I; also Laurence H. Tribe, "Revisiting the Rule of Law" 64 *N.Y.U. L. Rev.* 726 (1989) discussing A. Scalia, "The Rule of Law as a Law of Rules" Oliver Wendell Holmes Bicentennial Lecture, Harvard Law School (Feb. 14, 1989).

[230] *R.* v. *S. (P.L.)*, *supra* note 195.

[231] *Ibid.* at 915-6.

[232] Hence the fact that, even before Canada's first *Criminal Code* was introduced, it still had a means of reviewing errors of law committed at the trial level: the writ of error.

[233] Wright, *supra* note 213 at 780. See also R. D. Gibbens, "Appellate Review of Findings of Fact" (1992) 13 *Advocates' Qu.* 445 at 446; *Menzies* v. *Harlos*, (1989) 37 B.C.L.R. 249 at 252 (C.A.) [hereinafter *Menzies*]; Frankfurter and Landis, "The Supreme Court of October Term, 1929" (1930) 44 *Harv. L. Rev.* 1 at 26-35; *Pendergrass* v. *New York Life Insurance*, 181 F. 2d. 136 at 138 (C.A. 8th, 1950) [hereinafter *Pendergrass*].

[234] *Royal Commission on Criminal Justice Report* (England, 1993) 171. See also Malleson, *supra* note 104.

[235] This problem is exacerbated by the fact that, in jury cases, an appellate court does not even know if a case was decided on the basis of the jury's findings related to demeanour of witnesses. Thus, the problem of demeanour has the effect of undercutting an appellate court's powers of review in all jury cases. However, see *Westpac Banking Corporation* v. *Spice*, (1990) A.T.P.R. 51, 386 (Fed. Ct. of Aust.) [hereinafter *Spice*], where the court found that the influence of a witness' demeanour, upon a trial judge's impression of that witness, is too pervasive and subtle to be fully comprehended by any verbal formula in the court's reasons for judgment. This passage suggests that demeanour would have a corruptive influence on appellate review of all cases, since a useful record would be unavailable in *all* cases.

[236] Kerans J.A., *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994) at 79; *Clarke* v. *Edinburgh Tramways Co.* 1919, S.C. 35 at 37 (H.L.) [hereinafter *Clarke*].

[237] *The Julia* (1860), 14 Moo. 210 at 235, 15 E.R. 210 (P.C.).

[238] *Nocton* v. *Ashburton* [1914] A.C. 932 (H.L.) [hereinafter *Nocton*].

[239] *Benmax* v. *Austin Motor Co.*, [1955] A.C. 370 (H.L.) [hereinafter *Benmax*].

[240] *Ibid.* at 375-6.

[241] See *Neo* v. *Renganathan Estate*, [1990] J.C.J. No. 3 [hereinafter *Neo*], where "questions of credibility and reliability were involved in resolving the conflict of testimony between" two witnesses, and so it was ruled, by the Judicial Committee of the Privy Council, that the appellate court could not interfere with the trial judge's finding of fact.

[242] Thus, a question of fact upon which no evidence was submitted to the initial trier of fact, is not arguable before the appellate court: *Barkway* v. *South Wales Transport Co. Ltd.*, [1950] A.C. 185 (H.L.) [hereinafter *Barkway*].

[243] *Secretary of State for Trade and Industry* v. *Gray*, [1995] 1 B.C.L.C. 276 at 285g-287b [hereinafter *Gray*]; *Fine* v. *Secretary of State for Trade and Industry*, [1997] N.L.O.R. No. 509 (H.C.J.) [hereinafter *Fine*].

[244] *R.* v. *Francois*, (1994) 91 C.C.C. (3d) 289 (S.C.C.) [hereinafter *Francois*].

[245] *Ibid.* at 296-7.

[246] *RJR-MacDonald* v. *Canada*, (1995) 100 C.C.C. (3d.) 449 (S.C.C.).

[247] *Ibid.* at para. 79. See also *Dorval* v. *Bouvier*, [1968] S.C.R. 288 at 293 [hereinafter *Dorval*]:

> Because of the privileged position of the judge who presides at the trial, who sees and hears the parties and witnesses and who assesses their evidence, it is an established principle that his opinion is to be treated with the utmost deference by the appellate court, whose duty it is not to retry the case nor to interfere by substituting its own assessment of the evidence for that of the trial judge, except in the case of a clear error on the face of the reasons of the judgment appealed from.

[248] *Geffen* v. *Goodman Estate*, (1991) 81 D.L.R. (4th) 236-7 (S.C.C.) [hereinafter *Geffen*]. See also *Radclyffe et al* v. *Rennie*, (1965) 53 D.L.R. (2d) 324 (S.C.C.) [hereinafter *Rennie*]; *Vitrerie Laurentien Ltee.* v. *Can-Euro Investments Ltd.*, (1990) 97 N.S.R. (2d.) 341 (S.C.).

[249] See *Overland Freight Line Ltd. et al.* v. *T.P. Ventures Inc. et al.*, (1985) 8 C.P.R. (3d.) 575 (B.C. S.C.) [hereinafter *Overland Freight*], in which conflicting affidavit evidence rendered the appellate court unable to determine the issues; the application was rejected. Conversely, where a question of fact concerns the interpretation of a written document, appellate courts have not deferred to the initial trier of fact beyond a correctness standard: *Scott* v. *Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445 [hereinafter *Scott*]; *Liverpool & London & Globe Insurance Co.* v. *Canadian General Electric Co. Ltd.*, [1981] S.C.R. 600 [hereinafter *Liverpool & London*]; *Doerner* v. *Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865 [hereinafter *Doerner*]; Kerans, *supra* note 236 at 80-1.

[250] *Farnya* v. *Chorny*, [1952] 2 D.L.R. 354 (B.C. C.A.) [hereinafter *Farnya*].

[251] *Ibid.* at 357. See also *R.* v. *Pressley*, (1948) 94 C.C.C. 29 at 34 (B.C. C.A.) [hereinafter *Pressley*].

[252] *R.* v. *MacKenna*, (1974) 9 Ir Jur (ns) 1, 10 [hereinafter *MacKenna*] quoted in Devlin, *The Judge* 63 (1979). See also *R.* v. *Pelletier* (1995) 165 A.R. 138 at para. 18 (C.A., *per* Cote J.A.) [hereinafter *Pelletier*].

[253] It has been suggested to me that members of the professional classes in Canadian society often use the "excuse" mechanism to avoid jury duty. Thus, there is some question whether juries are truly representative of Canadian society in a way that would put them in a position to judge the demeanour of certain witnesses, even if one accepts the dubious proposition that members of a community are able to tell when they are lying to each other.

[254] Certainly, when one considers the multi-cultural nature of Canadian society, it becomes increasingly difficult to suppose that findings relating to a witness' demeanour could be considered indisputable and obvious; such criteria would, of course, need to be satisfied in order to make the case that a trial judge is entitled to make findings of demeanour, despite the absence of evidence submitted at trial, under the principle of judicial notice.

[255] The concern that triers of fact *qua* juries might abuse their status, to the disadvantage of accused citizens who are also members of minority groups, generated the Supreme Court's decision in *R.* v. *Williams*, [1998] 1 S.C.R. 1128 [hereinafter *Williams*]. See also *R.* v. *Parks*, (1993) 84 C.C.C. (3d) 353 (Ont. C.A.), leave ref'd 87 C.C.C. (3d) vi.

[256] *R.* v. *Norman*, (1993) 87 C.C.C. (3d) 153 (Ont. C.A.) [hereinafter *Norman*].

[257] *Ibid.* at 173-4. See also *R.* v. *G. (G.)*, (1997) 115 C.C.C. (3d) 1 at 6-7 (Ont. C.A.).

[258] *Faryna*, *supra* note 250 at 356-7. See also *R.* v. *Covert* (1916) 28 C.C.C. 25 at 37 (Alta. C.A.) [hereinafter *Covert*].

[259] *Pelletier*, *supra* note 252 at para. 18.

[260] Of course, nothing here is meant to suggest that a trial fact-finder cannot *acquit* on the basis of demeanour alone: see *R.* v. *Lifchus*, [1997] 3 S.C.R. 320 at paras. 28-30 [hereinafter *Lifchus*]; *R.* v. *W. (D.)*, (1991) 63 C.C.C. (3d.) 397 at 409 (S.C.C.) [hereinafter *W. (D.)*].

[261] *R.* v. *Nadeau*, (1984) 15 C.C.C. (3d) 499 (S.C.C.) [hereinafter *Nadeau*].

[262] *Ibid.* at 501.

[263] *W. (D.)*, *supra* note 260 at 409. See also *R.* v. *Wilds*, (1998) 216 A.R. 176 at paras. 6, 9, 11 (C.A.).

[264] M. Plaxton, "Looking Beyond the Turn of the Eye: The Problem Of Demeanour and Appellate Deference in Criminal Cases" (Unpublished paper, 1999) at 7.

[265] See F. Kaufman, *supra* note 209 in Vol. 2 at 1189.

[266] *Burke*, *supra* note 207.

[267] *Ibid.* at 481-2.

[268] In the context of jury trials, these submissions *may* be taken as advocating a duty, on the part of the trial judge, to instruct the jury as to how it may arrive at findings of demeanour. I am uncertain what such an instruction would resemble – if one is feasible at all – and so I do not emphasize this point.

[269] It has become a notorious fact among jurists that many aboriginal witnesses so conduct themselves on the witness stand, not because they are being untruthful, but because these are character traits instilled through aboriginal culture.

[270] *R.* v. *Burns*, [1994] 1 S.C.R. 636 [hereinafter *Burns*].

[271] *R.* v. *Barrett*, [1995] 1 S.C.R. 752 [hereinafter *Barrett*].

[272] *Burns*, *supra* note 270 at para. 18.

[273] Needless to say, such "expert" findings fall well outside the range of what may be judicially noticed, being neither indisputable nor notorious. See David M. Paciocco, "Judicial Notice in Criminal Cases: Potential and Pitfalls" (1997) 40 *Crim. L. Q.* 35 at 38, 42: "*Ex hypothesi*, if it is something you would let an expert testify to, it cannot be admitted pursuant to this doctrine of judicial notice."

[274] See, for example, *R.* v. *P.(I.)*, *supra* note 197.

[275] See *R.* v. *W. (S.)*, (1994) 18 O.R. (3d) 509 at 517 (C.A., per Finlayson J.A.), leave to appeal ref'd [1994] 2 S.C.R. x [hereinafter *W. (S.)*]; *R.* v. *D.S.A.*, [1998] O.J. No. 1419 at para. 53 (Gen. Div.) [hereinafter *D.S.A.*].

[276] *R.* v. *R. (D.)*, (1996) 107 C.C.C. (3d.) 289 (S.C.C.) [hereinafter *R. (D.)*].

[277] *Ibid.* at 308. See also *R.* v. *Feeney*, (1997) 115 C.C.C. (3d) 129 at para. 31 (S.C.C.) [hereinafter *Feeney*]. For an explanation of the value of reasons for judgment, see *Mphahlele* v.

The First National Bank of South Africa Limited, 1 March 1999, South African Constitutional Court 23/98 at para. 12:

> There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right to access to courts if reasons for such a decision were to be withheld by a judicial officer.

Ultimately, the Court rejected the claim that such a constitutional right to reasons exists.

278 See, for example, the Maryland Court of Appeal's decision in *Walker* v. *State (Maryland)*, (February 10, 1999, Md. C.A.). The appellate body overturned a fact-finding of the trial judge, relying upon a videotaped transcript of trial proceedings. The Court of Appeal held that, because of the videotape, the appellate court was in as good, if not a *better*, position from which to observe the conduct of witnesses, as the trial judge.

279 http://www.law.warwick.ac.uk/Woolf/report (hereafter *Woolf Report*). See also "LCD Projectors Aid Presentations in 'Courtroom of the Future'" (1996) 23(6) *Technological Horizons in Education Journal*; "Presentation Technology Brings Courts Into the Future," (1996) VII(2) *Government Video*, 14-9.

280 I say 'almost' only because there is some question as to whether a recording could ever retain the atmosphere of the event as it happens. Perhaps, though, the expanded use of virtual reality technology could reproduce even 'atmosphere.'

281 Kerans J.A., *supra* note 236 at 86.

282 *R.* v. *Tat*, (1997) 117 C.C.C. (3d) 481 (Ont. C.A.) [hereinafter *Tat*].

283 *Ibid.* at 515.

284 *RJR-MacDonald* v. *Canada*, *supra* note 238.

285 *Ibid.* at paras. 79-81.

286 Brian G. Morgan, "Proof of Facts in Charter Litigation" in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987.) at 186.

287 *R.* v. *Biddle*, (1993) 84 C.C.C. (3d) 430 (Ont. C.A.), rev'd 96 C.C.C. (3d) 321 (S.C.C.) (for different reasons) [hereinafter *Biddle*].

[288] *Biddle* (Ont. C.A.), *ibid.* at 434-5.

[289] *R.* v. *Miaponoose*, (1996) 110 C.C.C. (3d) 445 (Ont. C.A.) [hereinafter *Miaponoose*].

[290] *Ibid.* at 453. See also *R.* v. *Cho*, [1998] B.C.J. No. 1618 at para. 6 (C.A.) [hereinafter *Cho*]; *R.* v. *Ayorech*, [1999] A.J. No. 923 at para. 4 (C.A.) [hereinafter *Ayorech*].

[291] *Tat*, *supra* note 282 at 514-5.

[292] The *Kaufman Report*, *supra* note 209 at 1094-1113, listed the common elements of cases that resulted in a wrongful conviction:

(a) perjured evidence by jailhouse informants or other unsavoury witnesses;

(b) perjured evidence by law enforcement officers;

(c) perjury committed by other witnesses;

(d) faulty law enforcement practices including

  (i) failure to investigate other suspects;

  (ii) withholding relevant evidence from both Crown and defence counsel; and

  (iii) pressuring witnesses to alter evidence;

(e) unreliable scientific techniques which appeared to have validity;

(f) false or misleading expert Crown evidence;

(g) incorrect eyewitness identification;

(h) prosecutorial misconduct; and

(i) incompetent or underfunded defence counsel.

While some of the above factors may be "cured" by a wide definition of what constitutes inherently frail evidence (*i.e.* identification evidence, jailhouse informant testimony), this certainly does not seem to be the case for all of them. Many would appear "curable" only after fresh evidence has been made available. That is, while the criminal justice system has ample experience to show that, barring the implementation of certain safeguards, (see, for example, Law Reform Commission of Canada, *Police Guidelines: Pretrial Eyewitness Identification Procedures* (Canada: Minister of Supply and Services, 1983); Gilles Renaud, "Identification Evidence: Cross-Examination inspired by Georges Simenon" Aug. 28, 1998, *Alan Gold Netletter* 072.) identification evidence is inherently unsafe, one would not want to suggest that all witnesses' testimony is inherently so. Nor would one want to presume the incompetence of defence counsel, or the bad faith of Crown agents. Thus, even wide powers of appellate review could not resolve all miscarriages of justice; it could only resolve some.

293 *Vetrovec*, *supra* note 177; *B. (K.G.)*, *supra* note 177; *Khan*, *supra* note 177; *F. (W.J.)*, *supra* note 177.

294 See Chapter I.

295 *R.* v. *Arcangioli*, [1994] 1 S.C.R. 129 at para. 46 [hereinafter *Arcangioli*].

296 *Ibid.*

297 At some point, the error of law may be such that prejudice to the accused becomes an irrelevant issue even within the context of s. 686(1)(b)(iii). For instance, where evidence is gathered contrary to an accused's *Charter* rights, and that evidence is improperly admitted at trial, it may be that s. 686(1)(b)(iii) cannot be used to sustain a conviction even though there is sufficient evidence, beyond that improperly admitted at first instance, to give rise to an "irresistable inference" of guilt: See *R.* v. *Elshaw*, (1991) 67 C.C.C. (3d) 97 at 130 (S.C.C., per Iacobucci J.). Thus, a "substantial error" may arise where the administration of justice has been brought into disrepute. See also *R.* v. *Hinchey*, (1996) 111 C.C.C. (3d) 353 (S.C.C.) [hereinafter *Hinchey*], where the Court held that the conduct of the trial was such that a reasonable bystander would conclude that the accused did not receive a fair trial, and that, as a consequence, s. 686(1)(b)(iii) could have no application.

298 Although, the appellate court is entitled to infer, from the original trier of fact's findings, what the hypothetical trier of fact would find: *R.* v. *Haughton*, (1994) 93 C.C.C. (3d) 99 (S.C.C.) [hereinafter *Haughton*].

299 *R.* v. *B. (F.F.)*, (1993) 79 C.C.C. (3d) 112 at 117 (S.C.C., per Lamer C.J.C.) [hereinafter *B. (F.F.)*].

300 *R.* v. *Colpitts*, [1965] S.C.R. 739 [hereinafter *Colpitts*].

301 *Ibid.* at 744.

302 *R.* v. *S. (P.L.)*, *supra* note 195 at 198; see also John Sopinka and Mark Gelowitz, *The Conduct of an Appeal* (Toronto: Butterworths, 1993) at 123-4.

303 *Colpitts*, *supra* note 300 at 756.

304 *R.* v. *Miller and Cockriell*, (1975) 24 C.C.C. (2d) 401 (B.C. C.A.) [hereinafter *Miller* (B.C. C.A.)]; aff'd (1976) 31 C.C.C. (2d) 177 (S.C.C.) [hereinafter *Miller*].

305 *Miller* (B.C. C.A.), *ibid.* at 457.

306 *Miller*, *supra* note 304 at 202.

307 *R.* v. *Wildman*, (1984) 14 C.C.C. (3d) 321 (S.C.C.) [hereinafter *Wildman*].

308 *Ibid.* at 335. See also *John* v. *The Queen*, [1985] 2 S.C.R. 476 [hereinafter *John*]; *R.* v. *Leaney*, (1989) 50 C.C.C. (3d) 289 (S.C.C.) [hereinafter *Leaney*]; *R.* v. *S. (P.L.)*, *supra* note 195.

[309] Spence J. seems to later acknowledge that his test is more stringent than alternative formulations: *R.* v. *Ambrose*, [1977] 2 S.C.R. 717 [hereinafter *Ambrose*].

[310] *R.* v. *Bevan*, (1993) 82 C.C.C. (3d) 310 (S.C.C.) [hereinafter *Bevan*].

[311] *Ibid.* at 328.

[312] *Ibid.* at 328-9 [emphasis added]. In *R.* v. *Broyles*, (1991) 68 C.C.C. (3d) 308 at 328 (S.C.C.) [hereinafter *Broyles*], Iacobucci J., writing for the Court, cited, with approval, the test laid down by Spence J., but interpreted it as a subjective-objective test in line with the test enunciated by Cartwright J. The Court has only rarely acknowledged that Spence and Cartwright JJ., respectively, have enunciated different s. 686(1)(b)(iii) standards: see *Ambrose*, *supra* note 309.

[313] Arguably, it could be said the most disadvantaged members of society are the ones who suffer most when a clearly guilty person is acquitted. Therefore, the failure to convict, and thereby segregate the most dangerous members of society, may be construed as a discriminatory practice in violation of s. 15 of the *Charter*.

[314] *R.* v. *Haughton*, *supra* note 298 at 107 [emphasis added].

[315] *Alward and Mooney* v. *The Queen*, (1977) 35 C.C.C. (2d) 392 (S.C.C.) [hereinafter *Alward*].

[316] The two accused were charged with a murder committed in the course of a robbery. The similar fact evidence concerned two robberies committed subsequent to the murder.

[317] *Alward*, *supra* note 315 at 396.

[318] The trial judge failed to explain what constitutes "specific intent" (the charge was murder), such as to show when drunkenness would be an effective defence.

[319] *Alward*, *supra* note 315 at 399-400.

[320] It is interesting to speculate as to whether Spence J.'s reasons demonstrate a personal disavowal of the s. 686(1)(b)(iii) test he formulated in *Colpitts*, or whether he was unaware, at the time of *Colpitts*, that a distinction could be drawn between his formulation and that of Cartwright J.

[321] *Alward*, *supra* note 315 at 400.

[322] See also *R.* v. *Cote*, (1993) 85 C.C.C. (3d) 265 (S.C.C.) [hereinafter *Cote*], where the Court affirmed the majority decision, of the New Brunswick Court of Appeal, that s. 686(1)(b)(iii) should be applied. Here, the trial judge wrongly charged the jury that it could convict the accused under the constructive murder provisions of the Criminal Code, as well as under the murder *simpliciter* provisions. The Court of Appeal held that the jury could not have acquitted the accused under the murder *simpliciter* provisions, despite the accused's testimony that he was too intoxicated to have the capacity to form the requisite specific intent. The Court of Appeal cited the testimony of witnesses who denied the accused's intoxication. Thus, there is, here as well, a finding of credibility.

323 *R.* v. *Jacquard*, (1997) 113 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Jacquard*].

324 *Ibid.* at 24-6. As to the fourth aspect of Lamer C.J.C.'s "apology" for the trial judge's error, it is interesting to contrast this case with *Arcangioli*, *supra* note 286 at paras. 47-8, where the trial judge's misdirection as to consciousness of guilt was compounded by a further misdirection. There, the Supreme Court unanimously directed that the curative proviso could not be applied.

325 *Sub nom R.* v. *Leaney*, *supra* note 308.

326 *Ibid.* at 306-7.

327 Wilson J. concurred with Lamer C.J.C. on this aspect of his dissent.

328 *Leaney*, *supra* note 308 at 296.

329 Rawlinson was charged with the break and enter and robbery of a drug store. In his anal cavity were found drugs consistent with some of the drugs stolen during the robbery. Lamer C.J.C., at 296, specifically draws attention to the fact that some of the drugs were identified as not being from the robbery. McLachlin J. only says that "[s]ome of the drugs found in Rawlinson's anal cavity... were consistent with some of the drugs stolen during the robbery." *Ibid.* at 307. It is difficult to say whether there is factual disagreement between McLachlin J. and the Chief Justice.

330 One could argue that *Leaney* may stand for the proposition that the application of s. 686(1)(b)(iii) to cases relying upon circumstantial evidence is inherently risky given the particular ease with which a reasonable doubt could be found in such cases.

331 As suggested above, it is submitted that under either Cartwright J.'s standard of s. 613(1)(b)(iii) review, or that of Spence J., the provision ought not to have been applied in the case of *Leaney*. Thus, it is unclear which of the two standards is applied by Lamer C.J.C.

332 *R.* v. *Titus*, [1983] 1 S.C.R. 259 [hereinafter *Titus*].

333 *Ibid.*

334 *Hinchey*, *supra* note 297.

335 *Ibid.* at 403.

336 *R.* v. *Beland*, (1987) 36 C.C.C. (3d) 481 (S.C.C.) [hereinafter *Beland*]; *R.* v. *Kyselka*, (1962) 133 C.C.C. 103 (Ont. C.A.) [hereinafter *Kyselka*]; *R.* v. *Clarke*, (1981) 63 C.C.C. (2d) 224 (Alta. C.A.) [hereinafter *Clarke*].

337 See also *Underwood* v. *The Queen*, (1998) 121 C.C.C. (3d) 117 (S.C.C.) [hereinafter *Underwood*], where the trial judge erred in refusing to rule on the Crown's application, to cross-examine the accused on his criminal record, until after the close of the defence case. This error effectively forced the accused to not testify in his own defence, out of fear that the Crown's cross-examination would unfairly prejudice him. The Supreme Court held that this error could not be

saved under s. 686(1)(b)(iii), inasmuch as the original trier of fact was not given an opportunity to hear the testimony of the accused.

338 *Sub nom R.* v. *Bevan*, *supra* note 310.

339 The Supreme Court's decision in *Vetrovec*, *supra* note 177, established that, in certain cases, the trial judge ought to instruct the jury that the testimony of certain "unsavoury witnesses" is "dangerous."

340 The "flip side" of *Bevan* is the case of *R.* v. *Olbey*, [1980] 1 S.C.R. 1008 [hereinafter *Olbey*], where the Court held that the trial judge's failure to warn the jury, as to the inherent frailty of the testimony of an accomplice, could be saved under s. 686(1)(b)(iii) on the grounds that the witness' testimony was not crucial to the Crown's case, and was not compounded by any related errors.

341 *Bevan*, *supra* note 310 at 329.

342 This was a short panel of five justices. Sopinka and Iacobucci JJ. concurred with Lamer C.J.C.

343 *R.* v. *B. (F.F.)*, *supra* note 299 at 118.

344 *R.* v. *S. (P.L.)*, *supra* note 195 at 198.

345 *Vezeau* v. *The Queen*, (1976) 28 C.C.C. (2d) 81 (S.C.C.) [hereinafter *Vezeau*].

346 *Ibid.* at 87.

347 *Ibid.* at 91.

348 *R.* v. *MacKenzie*, (1993) 78 C.C.C. (3d) 193 (S.C.C.) [hereinafter *MacKenzie*].

349 *Ibid.* at 218.

350 *Ibid.*: "The more stringent test stated by Dickson J. has not been revived with the passage of time."

351 *R.* v. *Morin*, (1988) 44 C.C.C. (3d) 193 (S.C.C.) [hereinafter *Morin*].

352 To say the least, Sopinka J.'s formulation of the test leaves much to be desired. I read it as meaning that the Crown must prove, on a high balance of probabilities, that the accused would have been convicted at first instance, barring the error in issue.

353 *Morin*, *supra* note 351 at 221.

354 *R.* v. *Finta*, (1992) 73 C.C.C. (3d) 65 (Ont. C.A.), aff'd 88 C.C.C. (3d) 417 (S.C.C.) [hereinafter *Finta*].

355 *Finta* (Ont. C.A.), *ibid.* at 208.

356 *R.* v. *Skogman*, (1984) 13 C.C.C. (3d) 161 (S.C.C.) [hereinafter *Skogman*].

[357] *Ibid.* at 171.

[358] *Sheppard*, *supra* note 182.

[359] *Ibid.* at 433.

[360] The directed verdict cases are instructive as to the test of sufficiency in preliminary inquiries because, in *Sheppard*, the Court held that the test was identical to that for directed verdicts. *Ibid.*

[361] *Ibid.* at 433. See also *Mezzo*, *supra* note 182; *Monteleone*, *supra* note 182 at 198 (S.C.C.); *Charemski*, *supra* note 182. One must bear in mind, as well, that under present Canadian law, a preliminary hearing is not deemed a court of competent jurisdiction for *Charter* matters. This means that the Crown may be able to use evidence at the preliminary inquiry stage that would be excluded under the *Charter* at the trial stage. See *R.* v. *Mills*, [1986] 1 S.C.R. 863 [hereinafter *Mills*].

[362] Professor Tim Quigley. "What I Did On My Summer Vacation: Reforming Criminal Procedure" *Making the Criminal Law Clear and Just: Criminal Reports Symposium* (Canada: Carswell, 1998) at 109.

[363] R.J. Delisle, "Sufficiency of Evidence: The Implications of Sheppard" (1978), 4 *Queen's L.J.* 111 at 122.

[364] A standard *wrongly* attributed to Estey J.'s judgment in *Skogman*. See Allan Manson, "Annotation to *R.* v. *Skogman*," (1984), 41 C.R. (3d) 1 at 3; also Marvin Bloos and Michael Plaxton, "An Almost-Eulogy for the Preliminary Inquiry: 'We Hardly Knew Ye'" (2000) *Crim. L. Qu.* (in press).

[365] Indeed, the Department of Justice would appear to agree with this evaluation. It is poised to effectively if not formally abolish the preliminary hearing. Kent Roach has described the proposed legislative changes:

> Reports of the death of preliminary inquiries have been greatly exaggerated. It appears that they will survive, albeit in a somewhat weakened state of health. Provided the prosecutor has not opted for "super" summary conviction offences proposed to be punishable by two years less a day, the accused could still obtain a preliminary inquiry under federal proposals released in September of 1998. He or she could, however, be required to identify the issues and evidence to be heard and to adhere to case management schedules. Moreover, presiding judges would be instructed under proposed s. 537(1.1) that they "shall order the immediate cessation of any part of an examination or cross-examination of a witness that is, in the opinion of the justice, abusive, too-repetitive or otherwise inappropriate."

Kent Roach, "Preserving Preliminary Inquiries" (1999) 42:2/3 *Crim. L. Q.* 161. See also Bloos and Plaxton, *supra* note 359.

[366] *Mills*, *supra* note 361.

[367] If anything, the federal government has responded not by expanding the power of trial judges to direct verdicts, but by virtually eliminating the preliminary inquiry altogether. See Roach, *supra* note 365 at 161.

[368] *Mezzo*, *supra* note 182.

[369] *Ibid.* at para. 53.

[370] *Monteleone*, *supra* note 182.

[371] *Ibid.* at 198.

[372] *Charemski*, *supra* note 182.

[373] *Ibid.* at para. 13.

[374] Blackstone, *supra* note 222 *at* 242.

[375] *Operation Dismantle* v. *Canada*, [1985] 1 S.C.R. 441 [hereinafter *Operation Dismantle*].

[376] *Ibid* at para. 28.

[377] *Wilson* v. *Minister of Justice*, (1985) 20 C.C.C. (3d) 206 (Fed. C.A.) [hereinafter *Wilson*].

[378] The issue was somewhat broached in *Thatcher* v. *Canada (Attorney General)*, [1996] F.C.J. No. 1261 (T.D.) [hereinafter *Thatcher*].

[379] *Re Bendahme* v. *Canada (Minister of Unemployment and Immigration)*, [1989] 3 F.C. 16, 95 N.R. 385, 61 D.L.R. (4th) 313 (Fed. C.A.) [hereinafter *Bendahme* cited to D.L.R.]; *Pulp, Paper and Woodworks of Canada Local 8* v. *Canada (Minister of Agriculture, Pesticides Directorate)*, (1994) 174 N.R. 37 (Fed. C.A.) [hereinafter *Local 8*].

[380] *Attorney General of Hong Kong* v. *Ng Yuen Shiu*, [1983] 2 A.C. 629.

[381] *Ibid.* at 638.

[382] *Bendahme*, *supra* note 379 at 313, 321.

[383] *Local 8*, *supra* note 379 at para. 42.

[384] *Baker* v. *Minister of Citizenship and Immigration*, [1999] S.C.J. No. 39 [hereinafter *Baker*].

[385] *Ibid.* at para. 26.

[386] *Applications to the Minister of Justice for a Conviction Review Under Section 690 of the Criminal Code* (Canada: Department of Justice).

[387] This is, in fact, a marked improvement in the procedure of s. 690. It has, in the past, been subject to sharp criticism that the process is conducted in secret. See Minister of Justice,

Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code. A Consultation Paper (Canada, 1998).

[388] *Ibid.* at 4. These principles were derived from the Federal Court's ruling in *Thatcher*, *supra* note 364.

[389] *Ibid.* at 2.

[390] Boyd and Rossmo, "David Milgaard, the Supreme Court and Section 690" (Feb. 1994) 18:1 *Can. Lawyer* 28-32.

[391] Hereinafter AIDWYC.

[392] Kirk Makin, "Wrongful conviction process of appeal called hollow remedy" *Globe and Mail*, February 18, 1999, at A8. It has been suggested, by AIDWYC, that the Minister of Justice, when administering s. 690, is caught in a conflict of interest situation insofar as the Minister is also the Chief Crown Prosecutor of Canada. See also Boyd and Rossmo, *supra* note 373 at 29, for evidence that the Minister of Justice will only seriously consider s. 690 applications where the case in question has acquired a certain level of publicity.

[393] *Sub nom Report of the Royal Commission on the Donald Marshall, Jr. Prosecution* (Canada, 1989).

[394] The *Criminal Cases Review Commission* (hereinafter CCRC) was created by the *Criminal Appeal Act 1995*. Like the amendments to appellate courts' power to review conviction, the CCRC was created in an effort to remedy miscarriages of justice.

[395] Minister of Justice, *A Consultation Paper*, *supra* note 387 at 5.

[396] *Ibid.* at 5-6.

[397] *Ibid.* See also Michelle MacAfee, "Lawyers applaud move on wrongful convictions" *Globe and Mail*, Aug. 27, 1998.

[398] *R.* v. *Vanloon*, [1997] O.J. No. 3209 (Gen. Div.) [hereinafter *Vanloon*].

[399] Citing *Burns*, *supra* note 270.

[400] *Vanloon*, *supra* note 398 at para. 9.

[401] *R.* v. *Morrissey*, (1995) 97 C.C.C. (3d) 193 (Ont. C.A.) [hereinafter *Morrissey*].

[402] *Ibid.* at 221.

[403] *R.* v. *G. (G.)*, *supra* note 257.

[404] *Ibid.* at 378-81. See also *R.* v. *R. F.*, [1999] B.C.J. No. 939 at para. 42 (C.A.).

[405] *Harper* v. *The Queen*, [1982] 1 S.C.R. 2 at 14 [hereinafter *Harper*]; also *Feeney*, *supra* note 277 at para. 32 (S.C.C.).

[406] See Chapter III.2.

[407] *Burns*, *supra* note 270.

[408] *R. (D.)*, *supra* note 276.

[409] *Ibid.* at 308.

[410] *Burns*, *supra* note 270 at para. 18.

[411] *Brooks*, *supra* note 7.

[412] *Vetrovec*, *supra* note 177.

[413] Seven judges took part in the decision. McLachlin C.J.C. and Gonthier J. concurred with the reasons of Bastarache J. Binnie J. concurred with Bastarache J.'s disposition of the case, but for different reasons. Arbour, Iacobucci and Major JJ. were in dissent.

[414] *R.* v. *Brooks*, *supra* note 7 at para. 5.

[415] *Ibid.* at para. 10, per Bastarache J.:

> The fact that King had sought to avoid incarceration by testifying, while certainly a factor which may undermine credibility, is not in itself sufficient to mandate a "clear and sharp" *Vetrovec* caution. An appellate court should show greater deference to the trial judge rather than to impose its view after the fact based on an abstract category of witness without having heard the testimonies directly.

[416] *Ibid.* at para. 6.

[417] *Canadian Charter of Rights and Freedoms*, preamble, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Canadian Charter of Rights and Freedoms*, s. 11(d), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; ***Reference Re Language Rights under s. 23 of the Manitoba Act, 1870,*** [1985] 1 S.C.R. 721 at 750-1 [hereinafter *Manitoba Language Rights Reference*]; *Roncarelli* v. *Duplessis* [1959] S.C.R. 121 at 142.

[418] Binnie J. held that the trial judge erred in law in failing to issue a *Vetrovec* warning, but would have applied the curative proviso under s. 686(1)(b)(iii).

[419] *R.* v. *Brooks*, *supra* note 7 at para. 129.

[420] *Ibid.* at para. 130.

[421] F. Kaufman, *supra* note 209.

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